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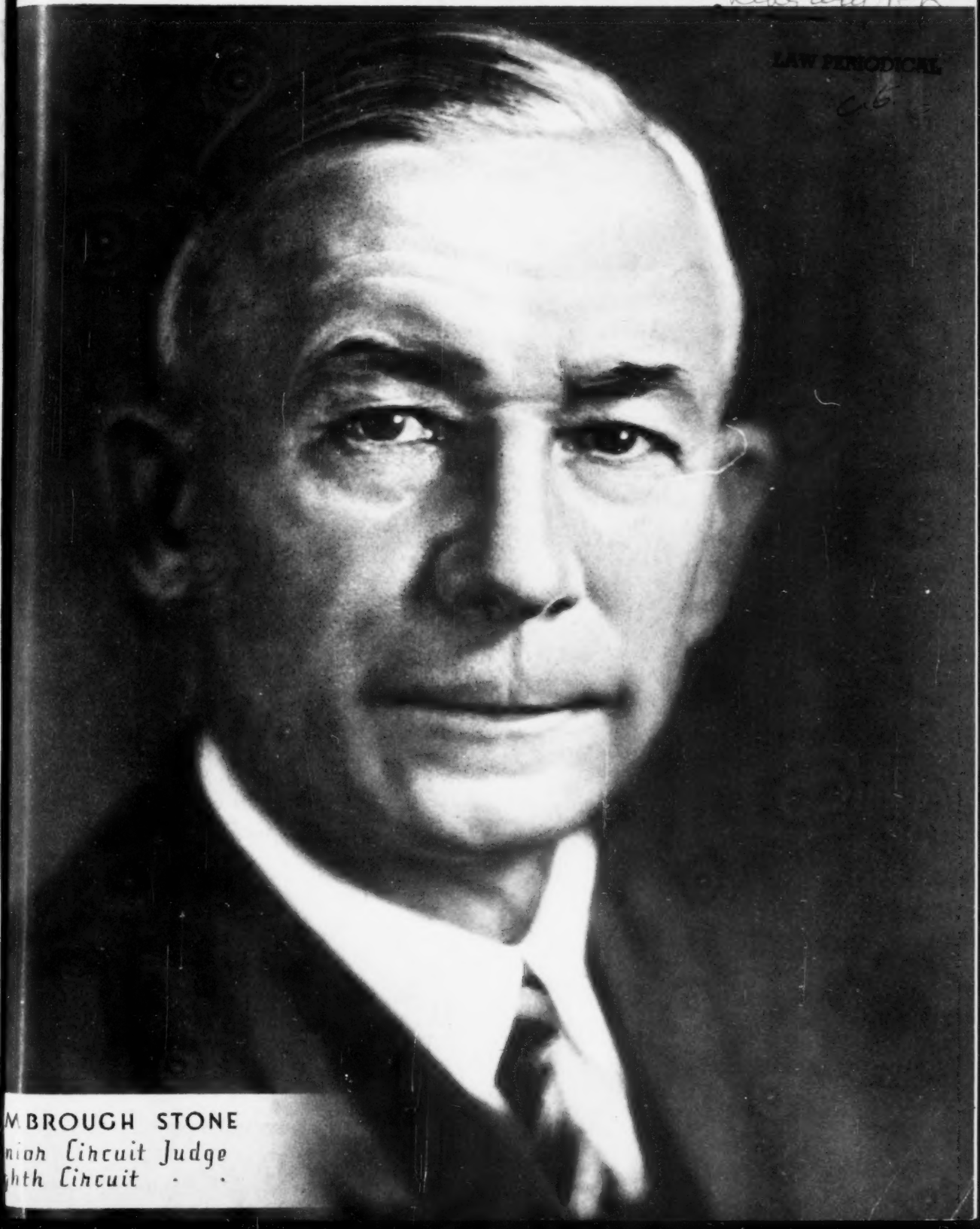

M BROUGH STONE
nion Circuit Judge
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May 1947

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by AMERICAN BAR ASSOCIATION at 1140 North Dearborn Street, Chicago 10, Illinois. Entered as second class matter Aug. 25, 1920, at the Post Office at Chicago, Ill., under the Act of Aug. 24, 1912. Price: per copy, 75c; to Members, 50c; per year, $3.00; to Members, $1.50; to Students in Law Schools, $1.50. Vol. 33. No. 5.

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THEY BUILDED BETTER THAN THEY KNEW — Selected Portraits for an American Gallery, 1895-1945, by Julius Henry Cohen of the New York Bar: Julian Messner, Inc., 1946. $3.75. Pages 376.

Extract from review **by Hon. WM. L. RANSOM,** *former President of the American Bar Association, in the April number of the American Bar Association Journal:*

"From an unusually eventful and useful career as a lawyer for private and public clients, and in the work of Bar Associations, and in the advocacy of many civic and public causes, a long-time friend and co-worker of many of us in the American Bar Association has put together a most readable and distinguished volume of his reminiscences and impressions of personalities and events of the past fifty years. Mr. Cohen has not written in scattered fashion of the personal side of the men and women he depicts. His integrated story is of an era, a moving drama, in which great personalities and ideas had their parts. His portrayal is of a period and of an idealistic movement to change America; it has a unity, a full-scale philosophy, a pervasive optimism, with now and then a pointed warning about some present trends."

OTHER COMMENT:

ARTHUR T. VANDERBILT, *Dean of New York University Law School, and former President of the American Bar Association:* "Here is biography of the finest kind. I recommend it to every lawyer and every law student, as well as to all who are interested in American public life."

WALTER P. ARMSTRONG, *former President of the American Bar Association:* "Here are revealing vignettes of many notable people Mr. Cohen has known—among them *Felix Adler, Frank Damrosch, William Travers Jerome, Belle Moskowitz* and *Alfred E. Smith.* Particularly penetrating are his studies of *Theodore Roosevelt* and *Louis D. Brandeis.* He modestly under-emphasizes the significance of his own efforts, but nowhere is to be found a clearer or more interesting account of the work."

CARL B. RIX, *President of the American Bar Association:* "I heartily endorse what Judge Ransom has to say about this book. It impressed me greatly and gave me a great deal of information which I think every American should have to help him with present day national problems."

JACOB MARK LASHLY, *former President of the American Bar Association:* "The galaxy of friends which the author has collected would in itself have justified this great work, for they are worthy, distinguished American types. In addition to that, his technical experience with the Port Authority and broad understanding of governmental and legal history has given great value to his pointed remarks and philosophical comments."

DAVID A. SIMMONS, *former President of the American Bar Association:* "The book has humor, but more than that, it is a record of hopes, failures and accomplishments in the field of industrial relations. It is imperative reading for those concerned with that problem and who now seek some path out of that jungle."

HON. JOHN C. KNOX, *Senior Judge, United States District Court:* "In addition to finding much enjoyment in reading one chapter after another, I found the text highly informative. It contains information of great value in many fields of public affairs."

HON. FREDERICK E. CRANE, *former Chief Judge, New York State Court of Appeals:* "The form of the narrative is very happy. The story of labor relations in the garment industry and the one dealing with the legal relationships between the States of New York and New Jersey and the creation of the Port of New York Authority should be read and thoroughly considered by every lawyer and legislator and business man."

JOHN W. DAVIS, *former President of the American Bar Association:* "This is an interesting and instructive book which I recommend not only for lawyers but for laymen to read. It gave me both entertainment and instruction."

HON. GEORGE WHARTON PEPPER: "The author has managed to put enough of himself into the narrative to give it vigor and vitality but he has successfully avoided anything like self-aggrandizement."

JULIUS HENRY COHEN

HON. HORACE STERN, *Judge, Supreme Court, Pennsylvania:* "Mr. Cohen has lived and worked with interesting people — people who, including himself, have made fine contributions to American law, government, culture and communal institutions. In his book he gives keen analyses of their characters and vivid pictures of their personalities, interspersed with comments of his own — sometimes shrewd, sometimes brilliant, always thoughtful—on the social and political problems of the last five decades. His style, charmingly informal, is vibrant with life and color. I cannot conceive of any lawyer, any person in public life, or any intelligent layman, reading this book without enjoying it immensely."

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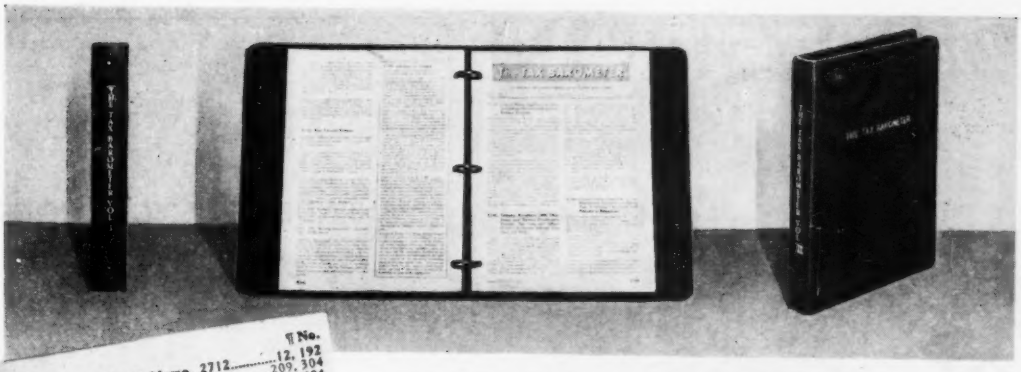

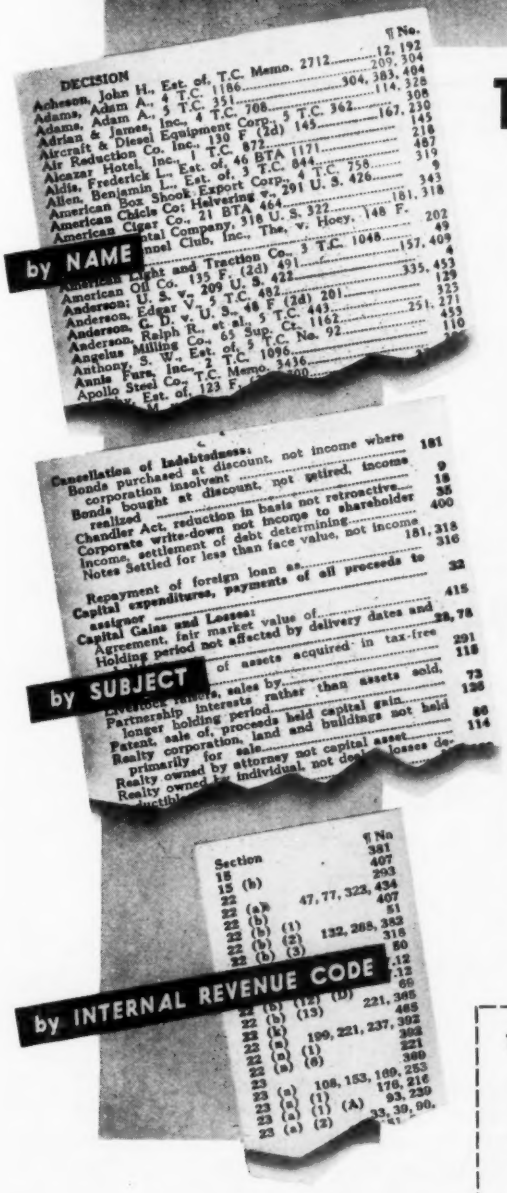

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1947 ANNUAL MEETING • CLEVELAND, OHIO

September 22-26, 1947

The Seventieth Annual Meeting of the American Bar Association will be held at Cleveland, Ohio, September 22 to 26, 1947. Further information with respect to the meeting will be published in the *Journal* from time to time.

Hotel Accommodations • Headquarters • Hotel Cleveland.

Hotel accommodations, all with private bath, except as indicated at Allerton, are available, as follows:

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To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice,** number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the RESERVATION DEPARTMENT, 1140 N. DEARBORN ST., CHICAGO 10, ILL.

The President and the Congress: Unsolved Problems of Leadership and Powers

by **Walter P. Armstrong** • of the Tennessee Bar

■ From the drafting of the Constitution and the founding of the Federal Republic, the relationships and responsibilities of The President and the Congress as to legislation have been controversial, at times acrimonious, under the American concept of the constitutional separation of powers between three departments of Government. Such issues have come to the fore in the public mind when, as now The President and the Congress are of opposing political parties; but lawyers and other students of government regard the accomplishment of an effective integration between the legislative and the Executive branches of Government as a task that needs continuing and constructive study, irrespective of partisan considerations.

The publication of Professor Binkley's searching historical analysis, *President and Congress*, and the offering of remedial measures by Senator Fulbright, of Arkansas, and Congressman Kefauver, of Tennessee, have led Walter P. Armstrong to survey the problems, historically and in the present tense. He has written more than a review of a notable current book. He has outlined "a gap in government" that could be bridged and overcome, if thoughtful men in both parties would lay aside partisanship and try to devise the steps that should be taken.

■ When I read that Professor Wilfred E. Binkley's *President and Congress*[1] is a revised edition of the author's *Powers of the President*, first published in 1937, my first thought was that timeliness had been sought by a reissue during a period when a Democratic President is struggling with a Republican Congress. I expected the emphasis to be placed upon instances where such a situation had arisen in the past. This, however, is not what Dr. Binkley has done. Instead, he has entirely rewritten his former work and has produced a well-balanced account of the relations between Presidents and Congresses from the beginning of the Government to the present.

A reader's first impression is likely to be that it is an account that is based on secondary sources and that it is factual rather than critically interpretative. Such a view is not necessarily depreciatory nor is it entirely accurate. Not necessarily depreciatory: Little room was left for original research; the history of each President's relations with Congress has been accurately written and rewritten; the need was to assemble in convenient form these scattered stories. The doing of this is a service of far greater value than any other that most authors could have rendered for it enables one to form one's own conclusions from sufficient evidence.

Not entirely accurate: Dr. Binkley, in addition to seconding each President's success or failure in dealing with Congress, seems to have explored, so far as they were available, the views on the subject of all Presidents and most Congressional leaders. Moreover, unity is achieved by an attempt to rationalize the Federalist, Whig, Republican and Democratic attitudes. Indeed, to one reader this is the most interesting, if not the most valuable, feature of the study.

Earliest Experience with the Separation of Powers

Most of the framers of the Constitution witnessed the functioning of the Government they had created during the first eight years of its existence, and their anticipations as to the relations between the President and Congress must have been fully realized. Influenced by Locke and Montesquieu and seemingly unaware of the Parliamentary revolution that had come about under the leadership of Pitt, they not only mistakenly found in their English model complete separation of powers, but designed the office of President for Washington, who was expected (as he did) to hold himself completely aloof from parties and factions.

It is true that in this earliest era Alexander Hamilton made a brief essay in the role of Prime Minister.

1. *President and Congress*. By Wilfred E. Binkley. New York: Alfred A. Knopf. 1947. $4.00. Pages 312.

WALTER P. ARMSTRONG

He was permitted to interfere in the affairs of other Cabinet members but was sharply rebuffed when he sought personally to appear on the floor of Congress in advocacy of his measures. Thus the Federalist plan of placing the initiation of legislation in department heads failed to materialize.

The Pattern of the Different Attitude of the Two Parties

Dr. Binkley's central thesis is the pattern that he finds emerging in subsequent years. Whig and Republican Presidents varied in their attitudes: Some attempted to take the lead in advancing a legislative program; others willingly left the initiative to Congress. Whig and Republican Congressional leaders, however, have uniformly insisted, by vote and voice, that theirs was the responsibility for legislation, regardless of whether the White House was occupied by a member of their own or the opposite party. On the other hand, Democratic Presidents have, with rare exceptions, attempted legislative leadership. And, while there have been sporadic rebellions, Democratic Congressional majorities have usually acquiesced.

Dr. Binkley develops his theme with a wealth of illustration and is factually accurate. His argument is persuasive when he contends that on the whole, Democratic Presidents have more frequently attempted, and have better succeeded, in leading Congress than have those of the Whig-Republican line. It is not nearly so simple, however, to classify those Presidents who, without seeking the aid of Congress, have attempted to attain their objectives by the use of executive power. Indeed, Dr. Binkley seems at times to labor under some confusion as to which of the two methods the "strong" Presidents used. This perhaps is to be explained on the ground that often there was an indistinguishable combination of both.

Seven Presidents Who Tried to Furnish Leadership for Legislation

Throughout our entire history there have been but seven Presidents who attempted with any degree of success to furnish Presidential leadership for Congressional legislation. Of these Thomas Jefferson, Andrew Jackson, James K. Polk, Woodrow Wilson and Franklin D. Roosevelt were Democrats, and William McKinley and Theodore Roosevelt, Republicans.

Jefferson, not only the leader but the creator of his party, placed his lieutenants in key positions in both Houses, and with their aid and by personal influence (his enemies called it intrigue) directed the course of legislation.

The concept of Andrew Jackson that the Presidential office was a basis for influencing Congress was entirely different from that of Jefferson. Jackson's election had marked the end of an era. His predecessors had been nominated by a Congressional caucus and two had been elected by the House of Representatives. Jackson, however, owed neither his nomination nor election to Congress. His firm conviction was that he was the first popularly elected President and "bore a mandate fresh from the hands of the 'sovereign' people." Satisfied that he alone represented the whole Nation, he abandoned the secret influence of Jefferson and obtained results by appealing to the people over the heads of the Congress.

James K. Polk, Whig and abolitionist historians to the contrary notwithstanding[2], was another "strong" President. He is placed among presidential leaders of Congress rather because of his publicly expressed belief in the principle[3] than because of his own conduct; his usual procedure was to present Congress with a *fait accompli*.

Woodrow Wilson's Enthusiasm for the British Parliamentary System

Woodrow Wilson was the first President thoroughly to explore all the theoretical implications and empirical advantages of Presidential leadership of Congress. Long before his election he had not only shown his enthusiasm for the British parliamentary system but had indicated his view that the President, like the Prime Minister, was cast for a double role—head of the government and party leader. As he put it, "the President cannot escape being the leader of his party except by incapacity and lack of personal force . . . . The whole art of statesmanship is the art of bringing the several parts of government into effective cooperation . . . . The President is at liberty, both in law and conscience, to be as big a man as he can."

This belief in the parliamentary system explains some of Wilson's important decisions: His appeal for a Democratic Congress in 1918; his insistence on a "solemn referendum" on the League of Nations. Twice he contemplated the most characteristic and most important step in the parliamentary system—resigning in the event of an adverse vote on a major measure.[4] In each instance the vote was favorable, but Dr. Binkley

2. "The impartial verdict of history" is not always impartial. Some historians are like that stout old Tory, Dr. Samuel Johnson, who "took care that the *Whig Dogs* should not have the best of it". *An Essay on Johnson*, by Arthur Murphy, page 379.

3. Polk first clearly stated the distinction between the function of a President as Chief Executive and as party leader.

4. Repeal of exemption accorded American vessels from Panama Canal tolls; the McLemore Resolution warning American citizens against traveling on armed vessels of belligerents.

doubts whether Wilson would have carried out his intention had it been otherwise—this because, before taking the irrevocable step, he would have realized that the Constitution did not provide a way in which at the same time Congress could be dissolved and the issue submitted to the people. Wilson never revealed what kind of an amendment he would have favored for bridging this—as it must have seemed to him—gap in the Constitution.

The amazing results achieved by Franklin D. Roosevelt in leading Congress, especially during his first term, are attributable not only to the abnormal conditions which existed but to the adroit way in which he combined the personal influence strategy of Jefferson, the mandate-from-the-people view of Jackson, and the parliamentary methods of Wilson.

The Methods of William McKinley and Theodore Roosevelt

The two Republican Presidents—McKinley and Theodore Roosevelt—who succeeded best in obtaining from Congress desired legislation, employed vastly different methods. McKinley was a Jeffersonian, Roosevelt, a Jacksonian. McKinley came to the White House after a long apprenticeship in the House of Representatives and with a sympathetic understanding of the viewpoint of the legislator. His courtesy, dignity, tact and convincing sincerity enabled him to exercise initiative without arousing resentment.

Theodore Roosevelt not only had the Jacksonian concept but his appeal was far stronger among the people than with the members of Congress. It was this and his working arrangement with Speaker Cannon, who at that time almost completely controlled the House, that enabled him to obtain the legislation he desired.

Theodore Roosevelt, however, by no means relied solely on Congress as the source of his power. His view, as he announced it later, was "that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers".[5] Accordingly he frequently took decisive action without seeking the sanction of Congress.

While no other strong Whig or Republican President ever publicly expressed this view, the tendency of those who did not willingly submit to Congressional domination was to act in accordance with it.[6] The most notable example is Hayes[7], who successfully resisted the attempt of the Senate to dictate his Cabinet appointments, bested Conkling in the New York custom house controversy and by his courageous vetoes defeated the attempts of a Democratic House to control Executive policy by attaching riders to appropriation bills.

Contrast Between the Congressional Leaders of the Two Parties

The contrast between the Whig-Republican and the Democratic leaders of Congress has been more clearly marked than between the Presidents. The sporadic revolt of Senator Barkley when he was majority leader during the Franklin Roosevelt administration was without Democratic precedent. Generally, the relations between Democratic Presidents and Democratic Congressional leaders have been harmonious. This was true even during the period when the slave power maintained itself by controlling Congress and assisting in electing Northern Presidents with Southern sympathies. On the other hand, Whig and Republican Congressional leaders have been almost as ready to force issues with Presidents of their own as with those of the opposite party. Furthermore, they have been consistent in announcing the doctrine of Congressional supremacy.

At least once these leaders appear to have prevailed upon one of their Presidents himself to make the announcement. No doubt it was the influence of Webster and Clay that caused William Henry Harrison to state the reverse of Jackson's mandate-from-the-people theory: "I cannot conceive that by fair construction any or either of its (the Constitution's) provisions would be found to constitute the President a part of the legislative power . . . . and it is preposterous to suppose that a thought could be entertained for a moment that the President, placed at the capital in the center of the country, could better understand the wants and wishes of the people than their own immediate representatives who spend a part of each year among them."

Years later Senator John Sherman, of Ohio, phrased it: "The President should have no policy distinct from that of his party and that is better represented in Congress than in the Executive." In logical sequence was the reputed remark of Senator Brandegee, when Harding was nominated, that the times did not require a first-rater as President.

Republican Assertions of Congressional Supremacy

It might be interesting to speculate whether this attitude toward the presidency developed virile Congressional leadership or whether the presence of strong leaders in Congress accounts for this attitude. In any event it is noteworthy how frequently, when Whig or Republican Presidents have been acquiescent, Congressional leaders have been aggressive. This was true throughout the terms of all the Whig Presidents; it was during the administration of Benjamin Harrison, a thoroughly Republican-type President, that the power of Speaker Thomas B. Reed was at its apogee.

The boldest Republican assertion

5. This was derived from Hamilton, who had written: "The general doctrine of our Constitution then is that the *Executive* power of the nation is vested in the President, subject only to the exceptions and qualifications which are expressed in the instrument." *Works of Alexander Hamilton* (Lodge ed.), IV. pages 142-144.

6. This is true also of at least one strong Democratic President—Grover Cleveland. Cleveland, a thorough believer in the independence of the Executive, was equally devoted to the separation of powers dogma and was largely unconcerned with obtaining the cooperation of Congress. In consequence the prestige of the Presidency was not enhanced in either of his terms.

7. Hayes rather than Lincoln, because Lincoln's extensive use of the Executive prerogative was based on the war power. It was acquiesced in only because of war conditions; his relations with Congress were never cordial.

of Congressional power was the impeachment of Andrew Johnson. In this connection Dr. Binkley makes a penetrating observation: After pointing out that the impeachment was entirely political, he suggests that if the Senate had voted to remove Johnson, the ultimate result might have been a revolutionary change in our form of government. While he does not elaborate, his thought apparently is that if Johnson had been convicted a precedent would have been established which would gradually have disseminated the doctrine that whenever there is an irreconcilable difference between the President and Congress on major issues and the requisite majorities are obtainable the President should be removed—impeachment and conviction thus becoming equivalent to a vote of "no confidence" under the parliamentary system.

Dr. Binkley Poses Problems But Offers No Solution

In making his thorough revision Dr. Binkley has painstakingly assembled and competently arranged his material. However, one closes his study with a sense of disappointment—not unlike that of the reader of a mystery story which ends with the mystery unsolved. He has posed the problem but has offered no solution. He has demonstrated by irrefragable evidence that there is in our constitutional system a defect in integrating the Presidency and Congress that so far has only been overcome by methods of improvisation.

Even when such methods are successful they are undesirable. The President frequently feels justified in entering into unsavory bargains and almost always makes a lavish use of patronage which sometimes approaches a prostitution of the power of appointment. At any time a crisis may come which will create an impasse between a strong President and a determined Congress which cannot be resolved by any method now available and that therefore may entail serious consequences to the Nation. Perhaps, as is our custom, we shall have to endure such a situation before we are persuaded seriously to attempt to solve the problem.

Dr. Binkley merely comments: "In any case, whatever its merits, a parliamentary system is out of the question in the United States in the foreseeable future." (page 266) Certainly no one can predict when any Constitutional change will come; nor does any seem in immediate prospect.

Indications of Trends for Effective Integration

There are, however, indicia not only that our thinking on this subject has undergone a change but that there is a discernible trend in favor of effective integration of the Executive and Congress. Moreover, the course the change will take, when it does come, is adumbrated. Not only the right but the duty of the President to act as a part of the legislature in recommending measures and using his veto[8] are clearly established.

Jackson's mandate-from-the-people theory, revived and popularized by the two Roosevelts, has gained general acceptance; indeed, it is likely that any President who in the future fails to take the lead in introducing and forwarding a legislative program will be deemed to have abdicated one of his most important functions.

There has been no comparable development in Congress. While the LaFollette-Monroney Act[9] has partly reorganized and should strengthen Congress it by no means implements it for national leadership. Indeed, in the House, where localism so frequently determines the membership, it is difficult to see how national leaders, independent of the President, can emerge.

Current Proposals to Make Presidential Leadership Effective

The purpose of recent legislative proposals is to make effective, not to supplant, Presidential leadership. The Kefauver Resolution[10] would take the first step by providing for a question period during which cabinet members would confer with Congress. It is difficult to see how there can be any objection to this save on the part of those intransigeants who are opposed to anything —however innocuous—that remotely resembles the parliamentary system.

The Fulbright Amendment[11] ten-

(Continued on page 511)

8. This view was of slow growth. There was introduced a resolution impeaching John Tyler which had for its basis his veto of a tariff measure when there was no Constitutional objection to it.

9. Legislative Reorganization Act of 1946, Chapter 753, Public Law 601, 79th Congress 2nd Session. Cf. "The Legislative Reorganization Act of 1946", by Charles W. Shull; *Temple Law Quarterly*, January 1947. Vol. XX—No. 23, page 375. For a penetrating discussion of the LaFollette-Monroney Act (commenting not only on its provisions but on its omissions) see the chapter titled "Postscript" in George B. Galloway's *Congress at the Crossroads*, Thomas Y. Crowell Co., New York, 1946.

10. Now House Resolution 17 of 80th Congress 1st Session. For a discussion by Representative Kefauver and others see *Congressional Record*, March 27, 1940, page 1808 et seq., and March 28, page A 1413. Cf. *The Kefauver Resolution*, by Armstrong, *American Bar Association Journal*, June 1944, Vol. 30, page 326.

11. Senate Joint Resolution 29 of 80th Congress 1st Session. The Committee on the Judiciary has not yet held hearings on the proposed amendment and therefore there has been no debate on the Floor. Senator J. S. Fulbright in a personal letter to the reviewer writes: "Generally speaking, my thesis has been that in the early days of this country, when we were not playing a part in international affairs of any great importance, it was tolerable to have the rivalry between the Executive and Legislative branches which is inherent in our system and non-action rarely led to any great disaster. However, with the assumption of obligations in the international field, it seems to me that some machinery should be worked out in which there is greater coordination between the Executive and Legislative branches. In other words, there is a pressing necessity that decisions on these problems be made promptly and positively." The Resolution in full is:

"JOINT RESOLUTION

"Proposing an amendment to the Constitution of the United States relative to the election and terms of office of President, Vice President, and Members of Congress.

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as a part of the Constitution when ratified by conventions in the several States, as provided in the Constitution:

" 'ARTICLE ——

" 'SECTION 1. The Congress by concurrent resolution or the President by Executive order shall have power to provide from time to time that an election shall be held in the several States for the purpose of choosing a President and Vice President, Senators, and Representatives in Congress, for the terms hereinafter specified. Such election shall be held on the first Tuesday which occurs more than ninety days after the date of passage of such concurrent resolution or the promulgation of such Executive order.

" 'SEC. 2. If no election under section 1 shall have been called before the date scheduled for the Presidential election next following the date of the ratification of this article, a President, Vice President, two Senators from each State, and Representatives in Congress

The 350 Hearing Examiners:

Chairman Wiley Asks Open Choices for Fitness

■ Senator Alexander Wiley, of Wisconsin, Chairman of the Senate Committee on the Judiciary, has interested himself and his Committee actively in the bases of selection for the 350 Hearing Examiners for administrative agencies, who are to be appointed during May or early June (33 A.B.A.J. 1 and 213; January and March, 1947, issues). In a trenchant letter to Commissioner Arthur S. Flemming, minority (Republican) member of the United States Civil Service Commission, he has given warning that "I shall be looking for substantial proof that the Civil Service Commission is going to fill these quasi-judicial posts with men of the highest unimpeachable caliber of the legal profession available, rather than with men who simply have occupied similar positions in the Federal Government today". His unusually vigorous letter, which becomes a lively part of the literature of the long struggle for impartiality in quasi-judicial determinations, contains evidence that this Senator who has been a member of our Association since 1923 reads the *Journal* in connection with his discharge of official duties.

ALEXANDER WILEY

■ The United States Civil Service Commission has not, at the time this issue of the JOURNAL goes to press, determined and announced the bases of its selection of the 350 Hearing Examiners who are to be chosen under its auspices, in May or early June, for these important posts under the Administrative Procedure Act. So far as has been publicly announced, it is not known whether the pending and future appointments as Hearing Examiners are to be restricted to the present Examiners and to members of the staffs of the administrative agencies, as some in Washington have insistently urged, or whether the places will be opened to the many judges, lawyers, experts in administrative law, etc., throughout the country and irrespective of partisan considerations, who have evinced interest in being considered for these highly important and well-paid quasi-judicial offices.

Chairman Wiley Serves Notice That He Wants Selections for Fitness

Meanwhile, Chairman Wiley of the Senate Committee on the Judiciary has notified the Civil Service Commission that he will insist that the selections shall be thrown open on a non-partisan basis and shall be made on the basis of fitness rather than party affiliations or ideology. His letter of April 5, was as follows:

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

April 5, 1947

"Honorable Arthur S. Flemming
Commissioner,
United States Civil Service Commission
Washington, D. C.

"Dear Mr. Flemming:

"As has been previously related to you from my office, I am keenly interested in the caliber of the some 350 hearings examiners who will be appointed under the Administrative Procedure Act. The reason for my interest is obvious.

"It has been stated on high authority that these hearings examiners will occupy posts as powerful or more powerful than those occupied by district or circuit judges. During the 80th Congress there will be very few judicial appointments. But here are some 350 quasi-judicial posts of the highest importance that are about to be filled.

"According to advice to me from some of the highest and most unimpeachable sources in the legal profession, it is feared that these hearings examiners will be appointed on a narrow partisan and ideological basis, with the selection largely limited to present examiners and agency staffs, with all members of other par-

ties largely excluded irrespective of their possibly superior qualifications.

Men of Outstanding Fairness and Judicial Temperament Are Needed

"I am determined that this condition which is feared shall not come about; that the men who fill these administrative examiner posts shall not, as has been well said by the AMERICAN BAR ASSOCIATION JOURNAL, be 'men of bias, of ideological pre-conceptions, of partisan fealty, of subservience to pressure groups, of habits of unfairness, of disregard of the true values and weight of evidence.' It seems to me that the burden of proof is on the United States Civil Service Commission that these hearings examiners will not be men of leftist thinking, men who don't have complete loyalty to our constitutional system of checks and balances, men who are not devoted to our system of private enterprise; but rather men of outstanding judicial temperament, who are unalterably dedicated to the preservation of the American Way.

"The President has recently issued his loyalty order for the removal from government payrolls of persons whose loyalty is open to question. It seems to me that we ought in this case to 'lock the barn door before horses of Red stripe can get in, rather than attempt to shoo them out once they get in.'

Substantial Proof of Selection for Qualifications Is Demanded

"Mere generalities that the Commission is going to take ample safeguard against Communists filling these posts is not enough. I am anxious not only that these appointees not be Communists, but that they not be appointees who will offer only shallow resistance to Communistic influences upon them. There are too many who, although they are not Communists, nevertheless lack the moral values with which to combat Communistic infiltration and pressure which is brought to bear upon them.

"I shall be looking for substantial proof that the Civil Service Commission is going to fill these quasi-judicial posts with men of the highest unimpeachable caliber of the legal profession available, rather than with men who simply have occupied similar positions in the Federal Government today, who largely are of one party, and who may lack the approach of private enterprise in their work.

"Looking forward to hearing from you on this matter at your earliest convenience, I am,

Respectfully yours,
Alexander Wiley"

Only Work and More Work Can Save Our Way of Life

■ "There is no place left to which to turn for regeneration except to America. We must answer that call or we shall fail civilization in its most tragic moment, and thus fail ourselves. We cannot do it by loans, grants, subsidies, bonuses or pious resolves. We can do it only by showing the real might of America—by justice; by helpfulness which insists upon self-help, and finally, by production and still more production. Then will come a respite in which the world may bind its wounds. Then man will find work so that he and those dear to him may live in a manner of his own choosing. . . .

"After the first World War I urged that the peoples be helped to go back to work. Who, if left alone, is not eager to work if, through his labor, he lives under better conditions in body and spirit? That is the way to gain self-respect and regain human dignity—deliberately destroyed by totalitarianism, regardless of what label it wears. . . .

"Today, as thirty years ago, the need is present. The same call is heard. Let all of us go back to work—to work, not for war, but for peace—to work under a system that gives each a share of the wealth he produces. . . . Work is the alchemist that changes drudgery into joy. That is every man's goal—that is every man's right.

"But we might as well look facts in the face: We cannot achieve our purpose with the present hours and limitations on work. Men and women will have to work longer and harder for some time to come in order to catch up with the ravages of war, if we are to regain our heritage; if we are again to be the missioners of hope and be rewarded for effort.

"And upon this change in our material outlook, there would follow a change in our sense of security. Make no mistake; our military lines are no stronger than the industry behind them. Unless we work, we shall see a vast inflation; unless we work, we shall not be able to maintain our claim to power. That would be the greatest blow we could receive, for it would strip us of our strength to preserve our way of life.

"Let us not be deceived—we are today in the midst of a cold war. Our enemies are to be found abroad and at home. Let us never forget this:

"Our unrest is the heart of their success. The peace of the world is the hope and the goal of our political system; it is the despair and defeat of those who stand against us.

"We can depend only on ourselves."

—From the Address of Bernard M. Baruch before the South Carolina Legislature on April 16.

3

Survey of the Profession:

Arthur T. Vanderbilt Chosen As Director

■ The *Journal* is privileged to announce in this issue that the Survey of the Legal Profession in Contemporary America has been set up and that Arthur T. Vanderbilt, of New Jersey, former President of our Association, now Dean of the New York University School of Law, has been unanimously selected as the independent Director of the Survey and has accepted. This action was taken on April 16 and 17 by the distinguished Council which our Association created for the purpose, to serve for the three or more years that will be required for fulfillment of the task. We regard this as the most important announcement the legal profession has ever published to its members.

The Survey will be conducted as an independent project in the interests of the profession and the public by the Director and the staff which he selects, and will go forward with the advice of the Council. The relationship of our Association is that it perceived the need for finding out the facts as to our profession, arranged for the financing of the Survey jointly by the Carnegie Corporation and the Association, sponsored the selection of the Council from among lawyers and non-lawyers with outstanding qualifications, and committed the project to the independent judgment of this distinguished body and the Director chosen by it. With these steps of organization completed in April, the Survey and its results are completely in the hands of the Director and Council.

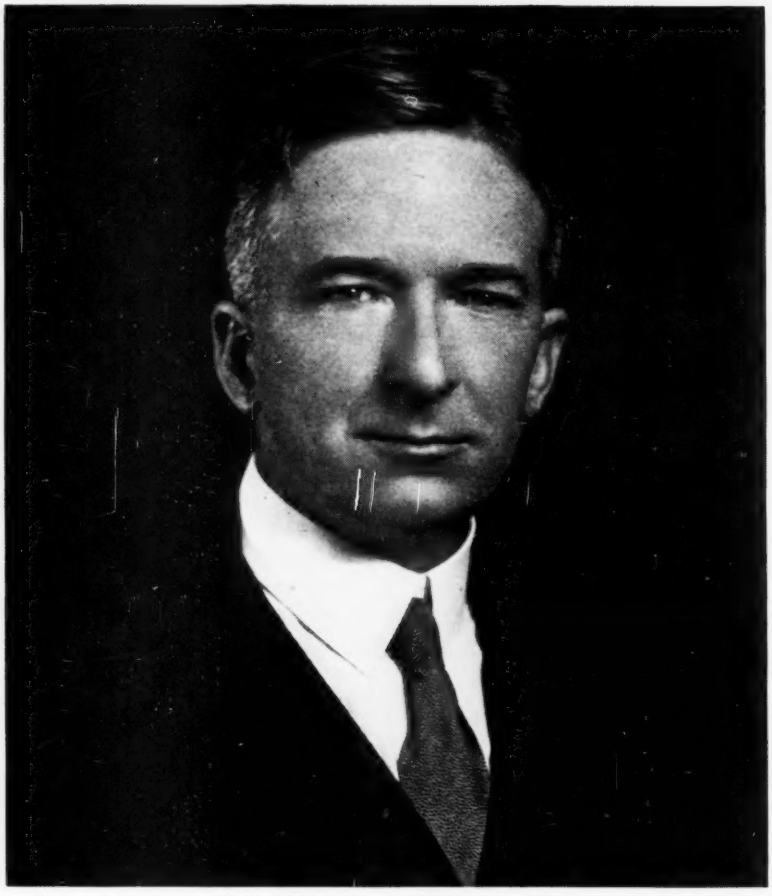
■ We believe that members of our Association, as well as the public, will share the gratification of the members of the Council that Dean Vanderbilt will organize and direct the Survey. His high standing and rich experience as a practising lawyer, his wide acquaintance with the profession in all parts of the country during his tenure as President of our Association, his scholarship and leadership in legal education, his service as Chairman of the Supreme Court's Advisory Committee on Rules of Criminal Procedure and the War Department's Advisory Committee on Improving Military Justice, and his capacity for dynamic and trail-blazing organization of whatever he undertakes, combined to make him the Council's natural first-choice.

Lawyers and the public should understand from the first what the Survey is and what it is not. It is not a survey of substantive law or of Courts or of procedures for improving the administration of justice as such. It is a study of *the lawyer* as he is in contemporary America—a study of *all* the lawyers, of all types and kinds, in all sorts of communities everywhere—not merely of such as belong to Bar Associations or are law school graduates or have conspicuous clients.

Some of the Many Subjects of Fact-Finding and Report

The over-all effort will be open-mindedly to find and report the facts as to how lawyers are educated, how they are licensed by their States, what they do in serving clients in their practice, what is their relationship to their communities and their part and place in government and public affairs, the availability of their services to all who need them, their functioning as ministers of justice and fair dealing, their standards of ethics and conduct, the practical workings of the procedures for discipline and disbarment of the unworthy.

The Survey will doubtless seek to find and report the facts also as to the organization of law offices and their work, the possibilities of improving the forms of association in the practice of law and of removing the tax and other discriminations against lawyers and law firms, the extent to which the province of lawyers is invaded by unauthorized practice, the costs of legal service to those the lawyers serve, the lawyers' own remuneration and earnings and financial security, the extent to which any "fringe" of the profession is sub-standard as to earnings and has an unduly hard struggle for subsistence, the extent of the lawyers' participation in the work of Bar Associations, the representative structure of the Bar Associations and the rise of such organizations in prestige and leadership—in fact, all of the myriad facts and factors which enter into and determine the unique role and service of the lawyer in a democratic society whose republican form of government is based on laws.



ARTHUR T. VANDERBILT

The Survey will have "no axes to grind", no preconceived point of view to be given inexorable support. The starting assumption no doubt is that the lawyer is generally "a trusted quarter-back on the American team" and that the independent profession is an institution which has grown without regimentation or rigid supervision, so that it has manifest elements of strength and usefulness along with weaknesses and defects, some of which are inherent in its very independence but others of which can be revealed, remedied or lessened, by wise planning over a period of years. Some of the facts disclosed by the Survey may be unpalatable and contrary to prior assumptions by lawyers generally, but the first thing to do is to find the facts, look at them, and see what can be done about them.

The success of the Survey will depend a great deal on the cooperation and assistance of many thousands of lawyers. The first-hand knowledge of members of the Bar in every part of the United States will need to be made available to the Director and his staff. The Survey cannot be colored by conditions in any one area.

Now the project is at the stage of planning and mapping out, by the Director. If any lawyer anywhere has views or suggestions, he should let the Director have them *now*. This Survey is *of us;* it has been put in the hands of lawyers and non-lawyers; it is to serve the public as well as the profession. Only an independent profession in a free country could or would do such a thing as to create an autonomous agency made up in part of "outsiders" and give such a body a free hand to "investigate" the profession, reveal its faults as well as its virtues, and submit the end-results to the public on whom the profession depends for a livelihood. The Director needs, and will be glad to have *your* views and suggestions, in time.

April Sessions of Distinguished Council for the Survey

The Council created by our Association to choose a Director of the Survey of the Legal Profession in Contemporary America and act in an advisory capacity for the duration of the Survey met in New York City on April 16 and 17, unanimously asked Arthur T. Vanderbilt to serve as Director, and obtained his acceptance.

When the project was decided on by the Association, it was concluded that the selection of the Director and the conducting of the Survey should be placed in the hands of an autonomous group of eminent persons and that the membership of the Council should include non-lawyers. Arrangements were made with the Carnegie Corporation whereby the latter, in view of its long interest in legal education and in the profession of law as a characteristic American institution, gave a grant of $100,000 for the project, with the Association pledged to contribute $50,000. Neither the Carnegie Corporation nor the Association will have any control or direction of the Survey. The Carnegie Corporation is not represented in the Council. The integrity and competence of the work will be a continuing responsibility of the independent Council. It is foreseen that the Survey will take at least three years.

Membership of the Council Includes Non-Lawyers

The members of the Council, as selected by President Carl B. Rix after consultations with many interested individuals and groups, are as follows: Dean Arthur T. Vanderbilt, of New Jersey; William Clarke Mason, of Pennsylvania; Howard L. Barkdull, of Ohio; Reginald Heber Smith, of Massachusetts; Dean Albert J. Harno, of the University of Illinois Law School; Judge Orie L. Phillips, of Colorado; Tappan Greg-

ory, of Illinois; Carroll B. Shanks, President of the Prudential Life Insurance Company; Honorable John W. Davis, of New York; Paul G. Hoffman, President of the Studebaker Corporation of South Bend, Indiana; Dr. John S. Dickey, President of Dartmouth College, Hanover, New Hampshire.

All of the members of the Council except Mr. Gregory were present at all or some of the New York City sessions. After the members had held informal conferences on April 16 as to the choice of a Director, Dean Vanderbilt arrived and was told of the unanimous desire that he become the Director.

At the organizational meeting which followed, Dean Vanderbilt acted as temporary chairman of the Council. A permanent chairman will be selected at the next meeting.

As the Council will be autonomous in its expenditure of the funds turned over to it for the Survey, Walter M. Bastian, of Washington, D. C., was made the Treasurer of the Council.

April Conferences for Preliminary Planning of the Survey

On April 17 the members of the Council, with President Carl B. Rix, met at the offices of the Carnegie Corporation and were received by President Devereux C. Josephs and by Dr. Oliver C. Carmichael, President of the Carnegie Foundation for the Advancement of Teaching. The organizational decisions of the Council were communicated to Messrs. Josephs and Carmichael, who expressed themselves as particularly pleased by the willingness of Dean Vanderbilt to become Director-in-charge.

Techniques for laying out and conducting the Survey were talked about informally, and the benefit of the Carnegie Corporation's varied experience in such surveys was obtained.

It now becomes the responsibility of the Director to develop a definitive and detailed plan for the Survey and to select and organize a staff for the many things to be done. Consultations with the Council will take place from time to time. The results of the Survey will necessarily depend on the soundness of the plan, the competence of the staff, the cooperation of the membership of the profession, and the vision and insight of the Director and Council.

The JOURNAL will from time to time inform its readers as to the plans for the work, the scope and details of the inquiries under way, and the progress of the Survey.

Bills as to the Jury System in Federal District Courts

Senator Pat McCarran, of Nevada, ranking minority member of the Senate Committee on the Judiciary, has introduced three bills for changes in the jury system in the United States District Courts. These were the subject of hearings before a sub-committee on April 23 and 24.

S. 17 would create a jury commission in each district, provide its compensation, prescribe its duties, etc. S. 18 would establish uniform qualifications for jurors, etc. S. 19 relates to the payment of the fees, expenses and costs of jurors.

The three bills are offered to effectuate improvements in the jury system. Members of our Association will do well to obtain and examine copies of the bills, and let Senator McCarran and their own Senators and Congressmen know their views and suggestions about them. The Association's Committee on Jurisprudence and Law Reform, of which Thomas B. Gay, of Virginia, is Chairman, is studying the bills and will submit to the sub-committee its opinions and recommendations as to the bills and their possible improvement.

4

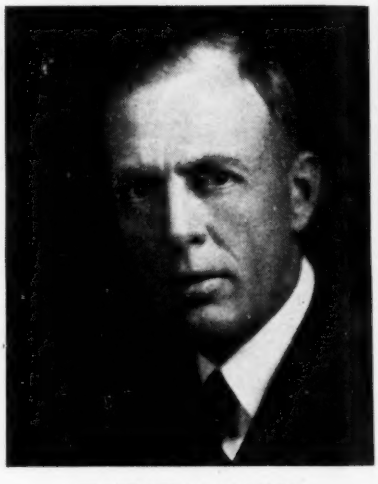
Judicial Administration:

The Avalanche of Appellate Court Opinions

by **Clarence M. Hanson** · Judge of the Los Angeles Superior Court

■ "It never rains but it pours". That is the gist of what Judge Clarence M. Hanson, of Los Angeles, finds in the article following as to the "deluge" of Appellate Court opinions. Changing his metaphor to call it an "avalanche", he gives a trenchant discussion of a situation which is an increasing problem for practising lawyers, for judges, for teachers of law, and for all who try to provide means by which the profession can keep abreast of the decisional law. Characteristically, Judge Hanson thinks that something should be done about the situation, and should be initiated under the auspices of our Association.

Judge Hanson was graduated from the State University of Iowa in 1910 and from the Harvard Law School in 1913, and practised law in Los Angeles. The Governor of California appointed him to the Superior Court of Los Angeles County on January 1, 1939. In 1940 he was elected for a six-year term; in 1946 he was re-elected. By appointment of the State Judicial Council, he served in 1941-42 as a *pro tem* Justice of the District Court of Appeals, and wrote forty-two opinions. Our readers will recall his controversial article "Findings of Fact and Conclusions of Law—An Outmoded Relic of Stage-Coach Days" (32 A.B.A.J. 52; January, 1946).



CLARENCE M. HANSON

■ The mounting avalanche of Appellate Court opinions, in number and in bulk,[1] is appalling, not only to the Bar[2] but to a host of Appellate Court justices as well![3] But, as Mark Twain once remarked about the weather, everybody criticizes but nobody does anything about it. At times it may seem that nothing can be done about it, but this cannot be true. Before we explore the possibilities of what can be done, we should inventory and assay, not only the viewpoints of the bench and Bar of today, but of yesterday as well.[4]

In the thirty-four years' tenure of Chief Justice Marshall, the Supreme Court handed down only 1215 written opinions—an average of thirty-six per year for all the justices of the great Court; of this total, Marshall alone authored an average of fifteen per year, or almost one-half of those of all his associates.[5] Yet, even fifteen opinions per year per justice would today be regarded as a very minor work-load.

In Marshall's period and for several decades afterwards, the Supreme Court definitely was not under any real work-pressure, and the history of the time indicates that the lawyers likewise were not overwhelmed with cases. Except for appellate court opinions, there was in that day a Sahara in the field of legal literature. The profession of that day expected

1. The total number of pages of decision for the five year period ending in 1913 was 175,000 pages a year in the United States as against 5000 in the English Reports—7 A.B.A.J. 270; June, 1921. By actual count made by the West Publishing Company, it appears that in the year 1945 the cases (not pages) reported in the National Reporter System totalled 18,222—and this was a war year! Quite apart from the tremendous waste of paper, is the expense to lawyers of the books and shelf-room and the time-element involved where exhaustive research is necessary.

2. John W. Davis: "The Case for the Case Lawyer"—41 A.B.A. Repts. 766. Henry E. Randall,

and desired long opinions which noticed and argued all the errors assigned.

It was then expected, if not demanded, that much of the language of the briefs and written argument of counsel should be set forth. That the opinions in Marshall's day were for the most part models of argumentative reasoning, even if not of brevity, may perhaps be conceded. They contained little in the way of the citation of, or quotation from, prior precedents.

Characteristics of Present-Day Opinions

Today, while our appellate court justices have caused the elimination from the reports of the arguments of counsel and their citation of authorities, the opinions themselves are largely devoid of either analytic or constructive reasoning of value for the future, but withal are much expanded in bulk. No doubt the change is largely due to the present day method of dictating opinions instead of writing them out in long hand.

No longer do we have many justices of the old school, such as Justice Holmes, who never dictated, but wrote every word of his opinions in long hand, standing up at the high desk which came to him from his father.[6] The combination possibly had much to do with the brevity of his opinions.

"Shears and Paste-pot" Opinions

When we survey the field of present day opinion writing, we find there are, as Justice Cardozo tells us, six distinct types. The last in order of merit, and upon which he pronounces his anathema, is the so-called text-book opinion, or what he calls "the tonsorial or agglutinative."[7] He chose these sparkling adjectives, no doubt, because—as he says—the shears and the paste-pot are the implements and the emblem of that type of appellate opinion.

We may rightly deduce from these strictures of the Justice that he meant to say that many opinions are composed by clipping from the printed briefs the statement of the facts and then supporting the ultimate decision equally as easily by pasting here and there, arguments and authorities narrated by counsel which, in a greater or less degree, tend to sustain the decision.

When we see, as we often do today, an unctious statement of a well-established principle, followed by a solid page or two of precedents, we may well be pardoned if we believe that the shears and the paste-pot have had much too large a sway.

Laziness or Ineptness for Judicial Work?

When we criticize, as did Cardozo, the use of the shears and the paste-pot, fairness would seem to demand that we recognize that appellate justices *sometimes* have been elevated to their position simply because of political reasons, and that in their capacity as justices they are doing the very best they can within their capabilities.

Sometimes, too, the shears and the paste-pot may represent downright laziness.

Three Categories of Appellate Cases

When we analyze the cases which reach an appellate court for decision, we discover, as the Justice tells us, that they fall into three categories:[8]

First: The class—a large majority of the cases—where "the law and its application alike are plain" and so "could not, with semblance of reason, be decided in any way but one."

Second: The considerable percentage group where "the rule of law is certain, and the application alone is doubtful."

Third: The class, "not large indeed, and yet not so small as to be negligible, where a decision one way or the other, *will count for the future* and will advance or retard, sometimes much, sometimes little, the development of the law."

If a large majority of the cases which reach the appellate courts present no problem of law or its application, as is stated by Justice Cardozo—and there appears to be no doubt of the correctness of his view—then it would seem to be self-evident that such cases not only do not call for an extended written opinion, but should be decided in a very short one, if an opinion at all is requisite.[9]

Such is the viewpoint of the Court

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formerly Editor-in-Chief of the West Publications, 5 A.B.A.J. 663; October, 1919; Charles A. Beardsley: "Judicial Draftmanship", 26 A.B.A.J. 3; January, 1940; Roscoe Pound, 33 Harv. L. Rev., 420, "The Progress of the Law," wherein Dean Pound said:

"Little that is new is involved in the decisions upon equity during the past year. There are a few interesting applications of settled principles. Also there are occasional instances of what the critical student of equity must pronounce judicial slips. But for the most part a reviewer may do no more than discuss the reasoning by which courts arrived at sound results called for by well-understood doctrines and point out certain tendencies in the administration of equity to which they appear to testify. In one aspect such a condition is gratifying, as indicating that the judicial system is functioning as it should. From another standpoint, however, it cries out for change. After reading upwards of fourteen hundred double-column pages of judicial opinions, carefully sifted from many thousands of pages in the National Reporter System, one is impelled to ask why paper, printer's ink, labor, and shelf-room should be devoted to the perpetuation of what for the largest part is avowedly but repetition of things long familiar and is too often merely elaborate elucidation of the obvious."

3. Former Chief Justice Winslow of the Supreme Court of Wisconsin, quoted in 7 A.B.A.J. 270; June, 1921; former Chief Justice Emlin McClain of Iowa, 25 A.B.A. Repts. 373, 392.

4. See notes 2 and 3.

5. James M. Beck: "The Memory of Marshall," 21 A.B.A.J. 345, 350; June, 1935.

6. From a letter to the writer by George L. Harrison, President of New York Life Insurance Company, legal secretary to Mr. Justice Holmes 1913-14. In the latter years of his life (1924 onwards), Mr. Justice Holmes used the high desk occasionally, but more often sat at a desk which came to him from his grandfather (data from a letter from Professor Leach who was legal secretary to Justice Holmes during 1924-25).

7. Cardozo: *Law and Literature*, pages 10, 31.

8. Cardozo: *The Nature of the Judicial Process*, page 164 et seq.

9. While the Constitutions of nine States provide that their Appellate Courts shall, in writing, state the "grounds of decision", or "each question arising upon the record and the decision of the Court thereon", or the "reasons for the decision", or language substantially analogous, the Appellate Courts in all these States have interpreted the applicable constitutional provisions as requiring only a consideration of errors deemed by the Appellate Court to be material to the decision. See *State* v. *Smith*, 193 S. E. 573, 119 W. Va. 347; *Hall* v. *Bank of Virginia*, 15 W. Va. 323; *Renick* v. *Ludington*, 15 W. Va. 323; *Henry* v. *Davis*, 13 W. Va. 230; *Trayser* v. *Indiana Asbury University*, 39 Ind. 556; *Willetts* v. *Ridgeway*, 9 Ind. 367; *State ex rel. Sluss* v. *Appellate Court of Indiana*, 17 N. E. 2d 824, 214 Ind. 686; *Smarr* v. *Smarr*, 6 S. W. 2d 860, 319 Mo. 1153. Moreover, in some States, as in California, the highest Appellate Courts grant or deny petitions for hearing or certiorari without the slightest reference to the apparent demands of their Constitutions. Where the restriction is imposed, not by a constitution, but by legislation, all Courts hold the legislature is without authority to control the judiciary.

of Appeals of New York. A somewhat similar view prevails in the Supreme Court of the United States, where writs of certiorari are rather crisply denied and without comment upon the authority of a list of cases set forth merely by name, Court, volume and page. If the procedure of the Court of Appeals of New York and the Supreme Court of the United States were followed by all appellate courts, the volume of opinions would at one stroke be cut to less than one-half of its present daily output.

Cases Where the Application of the Law Is Doubtful

When we turn to the second class of cases mentioned by the Justice, we encounter the type where the law is certain but its application alone is doubtful. In that class it is evident that there is no occasion for an opinion to expatiate upon, or to reason, as to what should be regarded *as the law*, but merely to state what *the law is* by reference to one or two adjudicated precedents. There is no need to carry coals to Newcastle. There is a necessity only to determine on which side of the line the particular case can be said to fall.

The application of the facts to the law may now and then invite and demand some considerable reasoning and discussion, but, even so, there is no occasion to discuss elemental principles of law or to pack the opinion, line after line, with a digest of, or quotations from, all or a large number of authorities that are germane to the question involved. To the extent that *the needless* is eliminated the output is reduced.

The Cases of First Impression

In the third class of cases we have, generally speaking, the cases of first impression or cases wherein counsel question, more or less rightly, the identity or applicability of precedents. In this class of cases, conflicting principles often compete for mastery, and so necessitate a choice based on reason and analogy, of the principle which is regarded as being the most fundamental and just.

In this type of case, it is crystal clear that the creative element in the judicial process rightly comes into play and so oftentimes warrants a long opinion. Even so, there is no merit in "padding", but, on the contrary, an appellate justice definitely should "condense, condense, and again condense,"[10] in order that new principles, or extensions of old principles be accurately stated and defined.

The "Blue Pencil" of Revision

It is self-evident that the length of many opinions could be reduced considerably by the "blue pencil of revision." If what a Court has formerly said in a case is regarded as controlling and yet is deemed of such importance that it should be stated again or quoted, then why not rest on the restatement or quotation, without more? In this connection it may be observed that Justice Holmes generally was not given to listing the authorities, except for one or two, or for that matter quoting from them.

Evidently he assumed, as he rightly might, that a list of the authorities could readily be found by reference to the key-number in the digester's headnote. It is perhaps trite to say that "the blue pencil of revision" can accomplish much, and seldom if ever is its function overdone. The pressure of work on the justices of some of our appellate Courts is such that they have little, if any, time to spend in revising the opinions drafted by them. This, however, is due in large part to the fact that opinions are written *in extenso,* in cases which do not call for an opinion or at most for a short one.

Correctness of Decision Does Not Preclude Brevity

We are not entitled to expect or demand that all our appellate justices should possess the ability of a Holmes for terse statement. Correctness of decision is equally as important.

This does not imply that Justice Holmes was not possessed of both faculties. Instead, the most frequent contention *here* is that there are very few appellate justices endowed with the variety of abilities possessed by Holmes. With all his abilities, Holmes was never satisfied to rest on his initial draft of an opinion. While he seldom, if ever, had occasion to prepare a second draft, the original was carefully edited by him and often contained numerous deletions and interlineations. Almost, if not always, it was the original draft with pen and ink corrections that became the final draft.[11]

Not Easy to Write Opinions Concisely

So far the endeavor has been to point out a few simple mechanical methods for reducing the length of an opinion, once it has initially been drafted or revised. Plainly it is quite another matter, even initially, to draft or revise the language of an opinion—particularly so, where a justice is called upon to decide a case

10. John H. Clarke: "How the United States Supreme Court Works," 9 A.B.A.J. 80; February, 1923.

11. "In the year I was with him he (Justice Holmes) wrote, as I remember it, about fifty opinions, including dissents. In each case the original manuscript went to the printer, with, of course, some deletions or interlineations. But never in that year was a second draft necessary. It is true that, as you say, he took considerable time in editing his original draft. But it was the original draft with pen and ink corrections that became the final draft.

"One brief story may interest you by way of emphasizing the Judge's valuation of every individual word. He had prepared an opinion for the printer and as was his custom he let me read it over, asking for my comments. It was with great temerity that I suggested that he had not covered a particular point raised by the defendant and discussed in Court at great length. True, it was not necessary for a decision of the case. But it was important, in my opinion, in disposing of it from the defendant's point of view. He insisted that he had covered the point to which I referred. I stuck to my guns and said that I thought not. He took the opinion out of my hand, pointed with his finger to one word and asked me what it meant. I gave what I thought was the usual meaning of the word. He said, 'Oh, yes, but what are the roots of the word; what was its original connotation?' I went to the dictionary and found that with the original roots and the original connotation it was possible to say that he had covered the point which I had claimed he had omitted. I said 'But, Mr. Justice, there is not one man in a thousand who will catch that meaning.' He asked me 'How long have you been working for me?' 'About six months?' I answered. 'Is not that long enough,' he asked, 'for you to know that I write for that one man in a thousand?' That ended the discussion. He would not change or add a word. Perhaps he was too much of a perfectionist. But I give you this account only to exemplify one of the characteristics of the man which made for brevity." (Letter from George L. Harrison to the writer.) See, also, note 6 above.

of first impression or rightly to upset a more or less well-established precedent.

Many a lawyer after reading a "best-seller" may conclude that story-writing is quite simple. If he were to attempt it, probably he would find that he could not construct a readable novel. An Arthur Train could see possibilities in a prosaic law case and write a gripping story based upon it, but how many other lawyers could do so?

The same is true of opinion writing. It may seem easy at first blush; but can we say that it is? Such a master craftsman as was Justice Cardozo tells us[12] that the writing of opinions *"is an ordeal to try the souls of men. Write an opinion, and read it a few years later when it is dissected in the briefs of counsel. You will learn for the first time the limitations of the powers of speech, or, if not those of speech in general, at all events your own."*

Someday, perhaps, a master craftsman in the art, such as were Holmes and Cardozo, will take time out to tell his Appellate Court brethren how he goes about preparing and composing an opinion, but until a master does so, they will have to struggle along with their own methods, developed through trial and error into a system of their own that is oftentimes none too efficient and none too satisfactory.[13]

The Mechanics of Reducing Bulk in Opinions

We are not here directly concerned with the art of composing opinions but largely with the mere mechanics of reducing their bulk. In that laudable desire we need to remind ourselves that the great majority of the appellate justices of America are as desirous as is the Bar of having the growing bulk of appellate opinions reduced.

Unfortunately, the justices can do too little about it. For more than a century there has been a demand by the counsel concerned that the opinion cover, upon an affirmance, every error assigned for reversal; and upon a reversal, every point urged for an affirmance.

Under those circumstances it is self-evident that our appellate justices are reluctant to break away from a system of opinion-writing that is rooted in more than a century of precedent. In the final analysis the fault must be laid at the door of our practitioners equally as well as at the threshold of our appellate Courts. Time and again our appellate courts have demonstrated in various ways that all that needs to be done to gain their practical cooperation is to reach them as units. We have no right to demand that individual justices should blazon the way.

Specific Suggestions for Practical Answer to the Problem

One answer to the problem, it seems to me, is for the American Bar Association to first go on record with respect to its views, and then for the President of the Association—as the representative of the practitioners—to appoint a committee composed of, say, all the Chief Justices of our highest State Appellate Courts, to see what they can suggest *and do* to solve the problem.

Such a Committee can, and no doubt will, accomplish results. As every appellate justice knows, the writing of an opinion involves a vast amount of drudgery and a tremendous waste of time, that he would gladly forego.

What is needed is a system that will eliminate the drudgery of opinion-writing in that vast array of cases where "the law and its application alike are plain" and where "the rule of law is certain and its application alone is doubtful."

It is not to be expected that individual justices here and there can change the system. But if all the members of the highest Appellate Court of a State should decide to do so, their action would not only be a beacon for other courts, but like smallpox might well prove to be catching.

The result desired by the practicing profession, and by the great majority of appellate justices as well, can be accomplished, largely, and perhaps only, by the method here outlined. Sooner or later the result will come to pass.

12. Cardozo: *Law and Literature*, page 8.

13. But for a few suggestions see, Cardozo, *The Nature of the Judicial Process* and the *Paradoxes of Legal Science*; Pound, *The Theory of Judicial Decision*; John H. Clarke, "How the United States Supreme Court Works", 9 A.B.A.J. 80; February, 1923; Emlin McClain, formerly Chief Justice of the Supreme Court of Iowa, on the "Evolution of the Judicial Opinion", 25 A.B.A. Reports 373, 392.

Second Regional Meeting for 1947

The second Regional Meeting of our Association under the plan written into the Constitution (33 A.B.A.J. 183; February, 1947) at the 1946 Annual Meeting in Atlantic City, was held at Jacksonville, Florida, on May 2 and 3, with President Carl B. Rix presiding. This gathering was especially for members in Alabama, Florida, Georgia, North Carolina, and South Carolina. A report of the meeting will be in our June issue.

5

Jurisdiction of World Court:

Reasons for Urging a New American Declaration

■ From the beginnings of the efforts to establish an international judicial tribunal and vest it with jurisdiction over legal disputes between Nations, this Association and its leaders have consistently and actively aligned themselves in favor of broadening the scope and authority of international adjudication. Our Association has repeatedly declared itself in support of the World Court and the Statute of the Court and in favor of extending the jurisdiction of the Court, and has many times urged that the United States accept the jurisdiction of the Court under the Statute.

In 1945, before the Committee of Jurists in Washington and the San Francisco Conference of The United Nations, our Association joined with the Canadian Bar Association in seeking, not only the continuance of the World Court and the perfecting of its Statute, but also the objective of universal obligatory jurisdiction of the Court as an ultimate objective, with the suggestion of an immediate substitute (31 A.B.A.J. 177, 225) for the "optional" provisions of Article 36, Paragraph 2, of the Statute.

Owing largely to the attitude of the United States and the Soviet Union in the San Francisco Conference, the strong preference of undoubtedly a large majority of The United Nations for giving the Court a broadly compulsory jurisdiction was not effectuated; but in nearly all other respects the joint proposals of the two Bar Associations (31 A.B.A.J. 336, 383) were embodied in the Statute of the Court.

The American Bar Association immediately began and actively led the fight for American acceptance of the jurisdiction of the Court (32 A.B.A.J. 427, 433). This was authorized by the Senate on August 3, with only two votes in the negative (32 A.B.A.J. 542). The Declaration by The President was deposited on August 26. The Declaration followed textually the Morse Resolution (S. Res. 196) with the Connally Amendment interpolated.

■ In reporting the Resolution adopted by the House of Delegates (March issue; page 249) and the debates in the House as to the Connally Amendment of the Morse Resolution (April issue; pages 400-401), we assured our readers that a future issue would give excerpts from the statement by the Committee for Peace and Law Through United Nations, of its reasons for recommending that the Association ask the Senate to reconsider the matter and to authorize the filing of a further Declaration that will withdraw and remove the condition or limitation attached by the Connally Amendment.

Through both its Assembly[1] and its House of Delegates,[2] the Association has taken its stand for withdrawing the Connally Amendment (33 A.B.A.J. 400-401; April, 1947). Members of the Association will recall that in reporting to the House of Delegates at the 1946 Annual Meeting, the Committee commented on the Connally Amendment of the Morse Resolution (S. Res. 196) and stated (32 A.B.A.J. 873; December, 1946) that "at such time as may seem to be appropriate your Committee will offer an analysis of the matter to the House, and will submit a recommendation for action". When the Resolution offered by Kenneth Teasdale, of Missouri, came before the House for concurrence, that body decided, by a divided vote, to hold the matter for a report and recommendation by the Committee, and for debate and vote, at the February meeting (32 A.B.A.J. 874; December, 1946). When the House action was reported to the Assembly, the latter adopted Mr. Teasdale's motion to concur in the House action. Meanwhile, the subject was extensively presented, from differing points of view in the *Journal*.[3]

At a time when the quality and good faith of American adherence and submission to The United Nations Organization and its agencies (which include the World Court) have

1. The text of the Resolution adopted by a substantial vote at a well-attended session of the Assembly in Atlantic City is at 32 A.B.A.J. 873-74; December, 1946 issue.

2. The text of the Resolution recommended by the Committee and adopted by the House of Delegates by a vote of about two to one, is at 33 A.B.A.J. 249; March, 1947 issue.

3. See, articles by Professor Lawrence Preuss, of the University of Michigan (32 A.B.A.J. 660); by Senator Wayne Morse (32 A.B.A.J. 776); and by Judge Manley O. Hudson (32 A.B.A.J. 832); also, an editorial on "Repercussions of the Connally Amendment" (32 A.B.A.J. 669).

With the Association's long record of activity consistently on the side of the World Court, its jurisdiction, and full American acceptance of that jurisdiction, it seems clear to your Committee that the Association's stand as to the Connally Amendment should be in keeping with its historic attitude and with the basic concept of American jurisprudence that legal disputants who have brought themselves under the jurisdiction of a Court cannot reserve to themselves the right to decide whether the Court has jurisdiction of a particular dispute.

Does the Connally Amendment contravene that attitude and that concept? We think that it does.

The Statute and the Connally Amendment

It should be noted at the outset that the present question is not as to whether the World Court should have jurisdiction over disputes which involve matters "essentially within the domestic jurisdiction of the United States." The Charter expressly denies such a jurisdiction to any organ of The United Nations (Article 2(7)). The question is as to whether the United States shall insist on the privilege for itself of depriving the Court of jurisdiction in any case brought against the United States by announcing that, according to the subjective judgment of the United States, this particular dispute relates to a domestic matter.

As reported unanimously to the Senate by the Committee on Foreign Relations, the Morse Resolution (S. Res. 196) followed the authorization and the language of Article 36, Paragraph 2, of the Statute, with a two-clause first "proviso", in which (a) followed the language in Article 95 of the Charter and (b) followed language in Article 2(7) of the Charter.[7]

The Geneva General Act of 1928 (Article 39) enumerated as among the possible reservations "disputes concerning questions which by international law are solely within the domestic jurisdiction of states." The British Declaration of September 19, 1929, contained an exception based on this pattern, as did the subsequent Declarations of fourteen other countries, including that of Canada.

Questions arising as to the applicability of such a reservation, or under such a Declaration as the Morse Resolution proposed, would have been subject to the provision of Article 36 of the Statute that "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Unilateral decision as to jurisdiction, by one of the parties to a dispute which arises, was thus excluded.

The hesitant point of view which emerged in the Connally Amendment first found expression in Article 2(7) of the Charter, which had not been in the Covenant of the League of Nations or in the filed Declarations, and reads as follows:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

This was vague in that it did not specify a forum for the determination as to whether a matter is "essentially within the domestic jurisdiction" of a state. It did not, however, purport to qualify or limit Declarations deposited under Article 36(2) of the Statute or to remove them from the provision of Article 36 that the Court shall decide disputed questions of jurisdiction under such a Declaration.

In view of the foregoing and the past practice, your Committee does not suggest that the Connally Amendment, in adding the words,

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been sharply challenged by spokesmen for other countries, the inclusion and retention of the Connally Amendment in the American Declaration seems bound to have repercussions which should lead to its early reconsideration and excision. The fears expressed by the Association's Committee and the House Resolution that the Connally Amendment "would mean that the United States had created the precedent for a serious backward step through narrowing and impairing the jurisdiction which many countries have vested in the Court"[4] have unfortunately been proved already to be well-founded.[5] Thus serious harm has been done and a backward step taken. Probably no more emphatic demonstration of full American adherence to the World Court and The United Nations could be taken at this time, than to file a new Declaration with the Connally Amendment omitted.

In view of the division of opinion in the Board of Governors and the House of Delegates as to the timeliness of the action, and in order that our members may make their own appraisal of the reasons which led the Committee and the House, after the fullest consideration and debate (33 A.B.A.J. 400-401; April, 1947) to advise and urge such a step, we give below the substance of the Report of the Committee on Peace and Law Through United Nations.[6] When conditions are favorable, the Association may be expected to press for action by the Senate along these lines.

4. 33 A.B.A.J. 249; March, 1947.

5. The Declaration deposited in March by the Government of France states (improvised translation) that "This Declaration does not apply to differences relating to matters which are essentially within the National jurisdiction as understood by the Government of the French Republic".

6. The members of the Committee presenting the unanimous recommendation are William L. Ransom, of New York, Chairman; Judge Frederic M. Miller, of Iowa, Vice Chairman; Reginald Heber Smith, of Massachusetts, Secretary; George A. Finch, of the District of Columbia, Tappan Gregory of Illinois; Frank E. Holman, of Washington State; William Logan Martin, of Alabama; Senior Circuit Judge Orie L. Phillips, of Colorado; Former Judge M. C. Sloss, of San Francisco; Charles W. Tillett, of North Carolina; Philip J. Wickser, of Buffalo, New York.

7. The text of the "Provided" clause of the Morse Resolution (before the Amendment) was as follows:

Provided, That such a Declaration should not apply to—

a. disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States.

"as determined by the United States", at the end of sub-paragraph (b) of the first proviso in the Morse Resolution (see above), violates the Charter or the Statute or is beyond the right of a state in depositing its Declaration.[8] When a dispute involving the United States arises, it still would be for the Court to decide whether the issues are within the obligatory jurisdiction accepted by the American Declaration. The Court would undoubtedly have to say that no jurisdiction exists where the United States, or the other party to the dispute, itself determines and announces that the matter is within its domestic jurisdiction.

To the extent that the Connally Amendment would operate in favor of the United States as the respondent in a dispute, it would also operate in favor of any declarant country in a dispute which the United States wished to bring to the Court. The "common ground" of the parties' Declarations is controlling; each has the benefit of any reservations or limitations which either party had attached to its Declaration.[9]

The Connally Amendment thus has a two-fold effect:

> (1) It narrows greatly the jurisdiction to which the United States accedes and that which the United States could otherwise invoke, in the interests of peace and the rule of law, under the broader Declarations already filed by most of the forward-looking, law-governed Nations; and
>
> (2) It amounts to a denial and repudiation by the United States, and by it alone among the member Nations, of the basic juridical principle that where disputants have submitted themselves to the jurisdiction of a Court at all, the question of the Court's jurisdiction must be for the Court to decide and cannot be left for what would amount to a controlling self-determination by one of the parties.

Merely to state these two aspects seems to your Committee to be conclusive as to the stand which our Association, and from a long-run point of view our country, must take as to this Amendment. The unanimous Report of the Senate Committee, in favor of the Morse Resolution without the limitation,[10] declared that

> a reservation of the right of decision as to what are matters essentially within domestic jurisdiction would tend to defeat the purposes which it is hoped to achieve by means of the proposed Declaration as well as the purpose of Article 36, paragraphs 2 and 6, of the Statute of the Court.

In its unanimous Report of July 25, 1946, the Senate Committee further stated that

> The ultimate purpose of the Resolution is to lead to general world-wide acceptance of the jurisdiction of the International Court of Justice in legal cases. The accomplishment of this result would, in a substantial sense, place international relations on a legal basis . . .

Because the Connally Amendment is a backward step, repugnant to the spirit and purpose of the Statute and the Charter, and because it aligns the United States anew with those who still hold back from acceptance of the role of law and the Court in international affairs, your Committee is of the opinion that our Association should record itself now as favoring the reconsideration of the whole matter by the Senate and the earliest practicable removal of the limitation now in the American Declaration.[11]

Can America Broaden Its Declaration Now?

Your Committee has considered the question which has been raised, to the effect that the United States cannot now amend or change its deposited Declaration but must wait five years, until it can serve a notice of termination and file a new one.[12] In principle a Nation cannot amend or withdraw a multipartite treaty without the consent of the other states which are parties to it. A Declaration under Article 36, although unilateral in character, is generally considered as creating a multipartite obligation as to other Nations which have filed under the Statute.

The question has some history. In 1936, Colombia "corrected" its Declaration of January 6, 1932, and added to it a new condition which —Colombia claimed—had erroneously been omitted from its Declaration as deposited with the League. A year later (October 30, 1937), Colombia *replaced* its Declaration, made five years before, with a new one, although its original Declaration had contained no termination clause. No state raised or reserved any objection at any stage, presumably because Colombia made a substantiated claim that its plenipotentiary had through mistake omitted a reservation which the Colombian Congress had voted before ratification.

When Paraguay in 1938 undertook to withdraw its filed acceptance of the "optional" jurisdiction under Article 36(2), its Declaration having contained no termination clause, other states reserved their right to treat this renunciation as invalid. When World War II began in 1939, Australia, Canada, France, Great Britain, India, New Zealand, and the Union of South Africa, undertook to add a sweeping reservation to their respective Declarations in force, to except disputes arising out of events during the war. They did this without waiting for the termination of their Declarations. No Nation was then in a position to challenge this seriously or to care much about it, but numerous states reserved their right to treat the added limitation as invalid.

8. The conclusions stated in this paragraph are in accord with those arrived at by Judge Manley O. Hudson in his authoritative article in 32 A.B.A.J. 832 at pages 835-36 and by others who have written lately on the subject.

9. It should be noted, however, that the Connally Amendment applies only to questions of jurisdiction arising under a Declaration pursuant to Paragraph 36 (2) of the Statute and does not limit or affect the Court's jurisdiction under a convention, treaty or agreement to which the United States is a party and which provides for the submission to the Court of disputes arising thereunder. The obligatory jurisdiction of the Court is constantly and greatly broadening in this respect, and will be further extended by the peace treaties.

10. Among the members of the Committee so reporting were Senators Tom Connally, Arthur H. Vandenberg, and Warren R. Austin.

11. The full text of the Declaration is in 32 A.B.A.J. 832; December, 1946.

12. See article by Judge Manley O. Hudson, 32 A.B.A.J. 897; December, 1946.

Each of the above situations involved the *amendment* of Declarations in force, without waiting for termination, and involved a *narrowing* of the jurisdiction consented to by the Declaration first deposited. Without expressing an opinion on the questions presented in such instances, your Committee is of the opinion that a state which has filed a Declaration containing a condition can at any time file a new Declaration which eliminates that condition. In so doing, it will be exercising only the right which the Statute gives to all states at any time, and doing only what it could have done in first instance. The consent of other states is not required, we think, for a state to *enlarge and broaden* its acceptance of the Court's jurisdiction.[13]

The British view has lately been manifested in concrete action. Having in force a general Declaration which contains some authorized reservations, Great Britain has offered also a special and much broader Declaration to govern its ancient dispute with Guatemala concerning a treaty affecting the boundaries of British Honduras. Recognizing that Guatemala's claim is "a legal dispute within the meaning of Article 36(3) of the Statute", the United Kingdom, in terms and without reservations, accepted the jurisdiction of the World Court as compulsory, in relation to any other state accepting the same obligation, in all legal disputes concerning the interpretation, application or validity "of any treaty relating to the boundaries of British Honduras." So far as known, no state has asserted any reservation as to this special broadening of the jurisdiction which the United Kingdom accepted in its general Declaration.[14] It is reported that Guatemala will accept the special submission, if the parties agree that the Court shall decide the case *ex aequo et bono*, as Article 38(2) of the Statute authorizes.

Your Committee had a phase of the present question before it in 1944-45, when it and the Canadian Committee joined in proposing to the Committee of Jurists and the San Francisco Conference that Article 36 of the Statute should be strengthened by "reversing" the nature and exercise of the "option" as to jurisdiction; viz., that Article 36 should recognize the jurisdiction of the Court as obligatory in legal disputes of the enumerated classes, subject to the right of any state to file a Declaration excepting itself wholly or in part from such jurisdiction, with a right on the part of such state later to withdraw, waive or modify its exclusion from jurisdiction, either generally or in particular cases. Your Committee was then of the opinion that no consent by other states would be required for such a unilateral withdrawal of limitations on jurisdiction under Article 36.

Your Committee is of the opinion that The President of the United States, upon being so authorized by the Senate, may at any time deposit with the Secretary-General of The United Nations a new Declaration which omits the Connally Amendment, and that such new Declaration will thereupon become effective, without the consent of any other Nation.

Conditions Which Are Suggested as Obstacles to Present Action

In recommending that the Association take an emphatic stand for withdrawal of the Connally reservation, your Committee is not insensible to the conditions which led to this retrogressive amendment and will be urged as grounds for delaying its elimination. We recognize their existence and their serious nature, but they do not seem to us to call for, or even to permit, delay on the part of our Association or our country, in deciding on which side we shall take our stand.

Collective security has not been established through The United Nations, although progress is being made. Aggressions, infiltrations, and materiel of mass-destruction (such as the atomic bomb), with which it is beyond the power of any one country to cope, are not yet under the adequate control of agencies of The United Nations backed by police forces sufficient to curb, prevent and punish offenses against peace and security; but the recent headway gives grounds for hope. The World Court has not been given its full and needed place and part in helping to end the disputes which rack the post-war world. International law and adjudication have not yet gained authority as a substitute for personal negotiations at the political level. America and England have not yet taken the leadership for referring legal disputes to the Court. Many agencies of The United Nations Organization are pervaded by those who seek to use it as means of re-making the economic, social and political structure of other lands, rather than the attainment of peace, security and law.

Under these circumstances and others, the disposition of at least the principal Powers is still to feel that each must keep itself in a position to defend, maintain and protect its own interests by its own action if need be, until such time as international security becomes a reality. So it does not meanwhile risk subjecting its own "vital interests" or "domestic concerns" to a majority vote, or even the processes of adjudication, in The United Nations. With negotiations and compromises as the prevalent method of dealing with all threats to peace, each Nation remains intent on preserving intact its own freedom of independent decision and action, in each situation that arises.[15]

(Continued on page 512)

13. This view is taken by Professor Philip C. Jessup, of the Columbia University School of Law, a noted authority who was a legal adviser of the United States Delegation during the San Francisco Conference in 1945 and in London in 1946.

14. For a discussion of the significance of the opportunity to submit the dispute to the World Court, see the letter contributed to the editorial page of the New York *Times* for January 26 by Willard B. Cowles, who is Chairman of the Section of International and Comparative Law but who wrote in his personal capacity.

15. The philosophy ascendant among the principal Powers at this stage was simply and clearly stated and explained by Sir Hartley Shawcross, the Attorney-General of England and Wales, in his brilliant address before the Assembly of our Association in Atlantic City (see 33 A.B.A.J. 31). Members of the House of Delegates will do well to read this carefully, in connection with this Report.

6

Administrative Procedure Act:

Scope and Grounds of Broadened Judicial Review

by John Dickinson • of the Pennsylvania Bar

■ Practising lawyers and students of administrative law have awaited an authoritative exposition of the scope and effect of the "judicial review" provisions (Section 10) of the new Administrative Procedure Act sponsored by our Association. They have waited and wanted to know whether a scholarly independent analysis would sustain the conclusions stated by Senator Pat McCarran, of Nevada, then Chairman of the Senate Committee on the Judiciary, that the legislative intent was indubitably to broaden the scope and grounds of the review of agency decisions by the Courts (32 A.B.A.J. 827; December, 1946).

Before the New York University Law School's Institute on the new Act, John Dickinson gave a painstaking and persuasive answer to these questions. He found no room for doubt that the Congress intended to broaden judicial review as it had lately been limited by the Supreme Court and that this intention was clearly effectuated in the new Act. His interpretation and demonstration are thus in themselves an event of major importance to the public and to the profession of law. The present article is condensed from that paper.

Dickinson was born in Greensboro, Maryland, in 1894. He attended Johns Hopkins University, Princeton University, and Harvard Law School. Meanwhile, he had taught history at Amherst and at Harvard, had been a summer-time law clerk in Northampton, Massachusetts, and had been a 1st Lieutenant attached to the General Staff in World War I. After serving a law clerkship in New York City and practising law in Los Angeles, he became a lecturer on history, economics, government and law, at several universities, professor of law at the University of Pennsylvania, Assistant Secretary of Commerce in 1933-35, and Assistant Attorney General in 1935-37. In 1937 he became the general solicitor of the Pennsylvania Railroad, its general counsel in 1941, and since 1946 its Vice President-General Counsel.

Throughout his distinguished activities in many fields, he has maintained a high reputation for careful research and independent thinking, and for the expression of his considered views. His philosophy of law and government were set forth in his 1935 book, *Hold Fast to the Middle Way*. His own relationship to the development of administrative law and procedural safeguards against agency abuses qualifies him to speak on his subject. He has been a member of our Association since 1935, has attended many of its meetings, and has served on numerous Committees. His home is at Trappe, Maryland.

■ The Administrative Procedure Act[1] stands at the end of a long history which illumines every part of it; and aside from that history, no provisions of the Act, least of all those having to do with judicial review, can be adequately construed.

I

The sequence of events which resulted in the Act reaches back at least to May of 1933, when the Executive Committee of the American Bar Association created its Special Committee on Administrative Law. That Committee came into existence simultaneously with a mass of early so-called "New Deal legislation", such as the National Industrial Recovery Act, the Agricultural Adjustment Act, and the Emergency Transportation Act. These laws represented the continuation of a tendency which had already made itself felt during the previous decade in the Packers and Stockyards Act, the Grain Futures Act, the Radio Act, and similar statutes which called into play a vast extension of administrative powers.

From 1933 the Bar Association's Special Committee served not only

1. *Public Law 404, 79th Cong., 2d Sess.*; approved by The President on June 11, 1946.

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as a continuing agency for observation and criticism, but also as the mainspring of the persistent efforts towards improvement which at last came to fruit in the Administrative Procedure Act.

The successive reports of the Committee are indispensable source-materials for the act. They began in the early years by indicating the points of concern at which the Bar was disturbed by the expansion of administrative power. One of these was the proliferation of quasi-legislative administrative rules, regulations, and Executive Orders, without adequate provision to bring them to the knowledge of those who were supposed to comply with them. That situation, exposed by the Supreme Court in the *Panama Oil* case,[2] was corrected at the instance of a group of Government lawyers headed by Judge Harold M. Stephens through the enactment of the Federal Register Act of July 26, 1935.[3]

Procedural Safeguards and Proper Review for Delegated Powers

The problem of surrounding the processes of delegated legislation with procedural safeguards, and making the output of rules and regulations amenable to proper review, has persisted. It has had its part in practically all subsequent proposals for reform and has contributed a Section—Section 4—to the Administrative Procedure Act. Because of limitations of space, nothing will be said here concerning review of quasi-legislative acts.

The problem of confining administrative action within the bounds of fair procedure and the limits set by law was from the outset felt to be pressing in cases of so-called administrative adjudication or quasi-judicial action—that is to say, cases where an administrative order is brought directly home to a particular applicant or defendant, and where it operates immediately to forbid or require someone to act. Here one of the abuses which it was thought should be corrected was the combination of the functions of prosecutor and judge in the same hands. There was also the problem of insuring to the parties adequate opportunity to present their case and a disinterested appraisal of the facts free from political interference or bureaucratic bias. These evils were pointed out in the second annual report of the Association's Special Committee, and the remedy there suggested was more effective judicial review. The Committee's language was as follows:

> The evils to which attention has been called, while they would still be present, would at least be mitigated if the decisions of administrative tribunals were subject to effective judicial, or at least independent review. With a handful of exceptions, however, they are not subject to such review.
>
> To be effective, review of an administrative decision must not only be by an independent body (*i.e.*, a body having no interest in the outcome, either as legislator, prosecutor or otherwise) *but must extend to the determination of issues of both law and fact.* Most of the statutes which provide for judicial review of administrative decisions specifically limit the reviewing court to questions of law . . . With such a restriction, the right of judicial review becomes, in the great majority of cases, a mere empty shell, particularly when the administrative tribunal (through its attorneys) consciously frames its findings of fact with an eye not so much to the evidence as to justify an *a priori* decision.
>
> What is even more disturbing is the recent tendency to avoid making any provision whatsoever for judicial review, and, so far as possible, to avoid the possibility of such review.[4]

Early Emphasis on Effective Judicial Review

This emphasis on judicial review led, during the debates in the Association, to the usual charge that the Committee wished to transfer the conduct of Government to the Courts, and proposed to overburden them with work for which they were not properly fitted.[5] The Committee subsequently pointed out that effective judicial review does not mean that every administrative decision will be reviewed, or that the Courts will take over the work of administration, but only that the possibility of Court review remains as a wholesome deterrent to improper administrative action. In the Committee's words:

> The ever present knowledge in the minds of the administrative tribunals that their decisions may be challenged in the Courts at any time and in any case is a constant spur to these tribunals to attempt to make their decisions square with the facts.[6]

Nevertheless, the disparagement of judicial review, which was dominant in the 'thirties in conjunction with a general disparagement of the Courts, may have influenced the Committee, for in its earliest proposals for legislation, it avoided the problem of judicial review and sought a solution in a somewhat different direction. These proposals, which were embodied in a series of bills associated with the name of Senator Logan of Kentucky, were directed primarily at the evil presented by the union of prosecuting and judicial functions in the same hands. The plan followed by the early Logan proposals was to deal with this problem by withdrawing at least some of the quasi-judicial functions from administrative agencies and lodging them in a separate body to be called "an Administrative Court". Before this Court the different agencies would appear in their executive or prosecutorial capacity in such matters as the revocation of licenses. The need for judicial re-

2. *Panama Refining* Co. v. *Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1935).
3. 45 Stat. 500 (1935).
4. 59 A.B.A. Rep. (1934) 546-547.
5. 59 A.B.A. Rep. (1934) 151.
6. 62 A.B.A. Rep. (1937) 843.

view would be circumvented by having the original action take place through a judicial body, namely, the Administrative Court, whose decisions, like those of other Courts, would be subject to appeal to the higher Courts.

Segregation of the Quasi-Judicial Functions of Agencies

The possibility of thus segregating the quasi-judicial phases of an administrative body's work from its executive phases had an allure at the time to many students of administration and found expression in some of the studies submitted in 1937 with the report of The President's Committee on Administrative Management.[7] Difficulty emerged when it was sought to translate the proposal into practice. There was, first of all, the problem of how to disentangle the quasi-judicial functions of an agency from its other functions, and secondly, where to lodge them after they had been so segregated. Many students suggested lodging them in a semi-independent position within the agency itself, and this suggestion, as we shall see, was later to bear fruit. The Logan proposals enhanced the difficulty, not merely by transferring them to a body outside the agency, but by seeking to combine them for a large number of different agencies in a centralized Administrative Court.

The inherent difficulties of the problem made the proposed Administrative Court from the beginning a thing of shreds and patches. The plan finally urged was to consolidate in the proposed Court only the judicial work of a very small number of agencies, such as the Customs Court and the Board of Tax Appeals, whose tasks were not within the field commonly regarded as administrative regulation. Aside from the jurisdiction which the proposed Court would inherit from these bodies, its time was to be absorbed in the single matter of the revocation or suspension of licenses, permits, registrations and certificates.

In this field the Court was to be given practically all the powers vested in the other departments, commissions and executive agencies of the Government. Among the more important items of jurisdiction over revocations of licenses which it was thus proposed to transfer to the new Court, were the jurisdiction of the Secretary of Agriculture to revoke registration of dealers at stockyards; of the Secretary of Commerce to revoke registrations of aircrafts and pilots; of the Postmaster General to revoke certificates of second-class mail privileges and to revoke mail privileges for fraud; of the Federal Communications Commission to revoke licenses for the operation of radio stations; of the Federal Power Commission to revoke licenses for the construction of dams; of the Securities and Exchange Commission to revoke registrations of securities, and of the Interstate Commerce Commission to revoke certificates for the operations of common carriers.[8]

Proposal and Abandonment of an Administrative Court

With this single exception in the matter of the revocation and suspension of licenses, the entire vast mass of important quasi-judicial functions would still remain with the existing agencies where they were already lodged, and as to these the Logan bills granted no relief whatever by way of improved procedure, judicial or otherwise. At the same time the volume of work proposed to be consolidated into the new administrative Court was so enormous that it was thought necessary to man the Court with forty judges.[9]

This proposal for an Administrative Court was elaborated in the Bar Association Committee's Report for 1936. At the Annual Meeting of the Association, some opposition was expressed; and while the Association approved the proposal in principle,[10] the Committee subsequently reconsidered its position after conference with other groups, including the Administrative Law Committee of the Federal Bar Association, of which the present writer at that time happened to be Chairman.[11] In the end, the Committee gave up the idea of consolidating quasi-judicial functions from separate administrative bodies into a central Administrative Court, and in its Report for 1937 adopted a wholly new approach, which was embodied in a draft bill submitted with the Special Committee's Report for that year.

Association Proposals for Judicial Review of Agency Decisions

This bill was the starting-point for all subsequent legislative attempts to improve administrative adjudication. Disregarding its first two sections, which dealt with quasi-legislative action, it proposed to establish two types of review for quasi-judicial administrative decisions. First, in Section 3, provision was made for an administrative review by an intra-departmental board of appeal, and, secondly, in Section 4, the bill provided for judicial review of administrative decisions by the Courts.

The provisions of Section 3 for administrative review contemplated setting up within each executive department an appeal board, segregated from other functions, and charged with deciding appeals from administrative determinations made within the department. This proposal was the residual survivor of the original theory of segregating in separate hands the judicial, as distinguished from the executive, work of administrative bodies. Under the new bill, this judicial work was not, however, to be handed over to, and consolidated in, an outside "Administrative Court" but was to be performed at the appellate level by a body within the agency itself, occupying, however, a somewhat detached and aloof position and en-

7. *The President's Committee on Administrative Management: Report of the Committee, with Studies of Administrative Management in the Federal Government;* Submitted to The President and Congress in accordance with Public Law 379, 74th Congress, Second Session, 1937; see, especially, "The Problem of the Independent Regulatory Commissions" by Robert E. Cushman, p. 215.

8. 61 A.B.A. Rep. (1936) 763.

9. For an outline of the Logan bill in its 1936 version, see 61 A.B.A. Rep. (1936) 760-767. This bill was introduced in the 74th Congress, Second session, in the Senate as S. 3787 and in the House by Representative Celler as H.R. 12297.

10. 61 A.B.A. Rep. (1936) 233.

11. 64 A.B.A. Rep. (1939) 581.

joying a certain degree of independence. While the bill confined the establishment of such appeal tribunals to the executive departments as distinguished from so-called independent commissions, it provided that the latter should conduct hearings at the trial level through an Examiner who should be required to make, and serve upon the parties, a copy of a proposed report, to which they might then file exceptions, and argue these in a proceeding of an appellate character before the Commission itself.[12] The substance of some of these provisions still survives in Sections 7 and 8 of the Administrative Procedure Act.

Proposals for Departmental Appeal Tribunals

The proposed departmental appeal tribunals, while modeled on existing bodies like the Board of Patent Appeals and the Board of Tax Appeals, which had given general satisfaction, nevertheless encountered strong opposition in the House of Delegates. The grounds of this were that, since such Boards would be appointed by the head of a department from among his own employees, they would have no real independence and their determinations would be entitled to no reliance. In the words of ex-Governor Slaton of Georgia, " . . . . the bill proposes in effect to place in the hands of the Executive Department, which is involved in the controversy, the decision of all questions of fact, and it is the decision of these fact questions which determines ninety-nine out of one hundred cases."[13] It was accordingly urged that the determination of facts should either be made by tribunals outside of the administrative agency altogether or that provision should be made for a more adequate and a fuller judicial review than was provided by Section 4 of the bill.

Review Provisions of Section 4 of the Proposed Act

The review provisions of Section 4 were universally applicable to all quasi-judicial decisions of all federal administrative bodies, and placed at the disposal of every person aggrieved by such a decision a uniform procedure for judicial review. This was by way of an appeal, on the record made before the administrative agency, to the Circuit Court of Appeals for the Circuit within whose jurisdiction the appellant resided or had his principal place of business. The Court was authorized to set aside an administrative order on any one of five grounds, namely, if it were shown that the order was (1) unsupported by evidence or (2) issued without due notice and reasonable opportunity to be heard, or (3) based on arbitrary and capricious findings of fact or (4) beyond the jurisdiction of the agency, or (5) in violation of the Constitution or statutes of the United States.[14]

The House of Delegates approved the bill in principle[15] but the views expressed during the debate in favor of fuller, simpler and more uniform judicial review, particularly on questions of fact, seem to have found response in the tone of the Committee's next Report, which was the work of Dean Pound as Chairman. It was in this Report that the following language of Chief Justice Hughes was quoted:

> An unscrupulous administrator might be tempted to say "let me find the facts for the people of my country and I care little who lays down the general principles."[16]

Broadening of the Association's Provisions for Judicial Review

With this Report the Committee submitted a slightly modified form of the same bill which had accompanied its report of the year before. The language of Section 4, dealing with the scope of review, was definitely broadened in two particulars with respect to judicial review of the facts: First, the phrase of the earlier bill "unsupported by evidence" was changed to read "not supported by substantial evidence"; and secondly, there was included a new ground for reversing a fact determination by an agency, namely, that "the findings are clearly erroneous".[17]

These changes were undoubtedly intended to broaden the scope of judicial review of the facts in the light of the dissatisfaction with the earlier bill expressed during the debate in the House of Delegates. A bill closely corresponding to this Bar Association draft of 1938, with a few relatively unimportant modifications, was introduced in the Senate by Senator Logan and in the House of Congressman Walter early in 1939, and became the so-called Walter-Logan bill.[18]

In the Committee's annotations of the bill accompanying its 1939 Report, there is an interesting discussion of the provisions of Section 4 which authorize reversal by the reviewing Court where the administrative findings of fact are "clearly erroneous" or "not supported by substantial evidence". The Report characterizes such Court review of the facts as only "permissive", and then goes on to say:

> It has not been intended that the reviewing Court shall review the evidence in any case unless and until counsel for the aggrieved parties shows to the Court that such action is necessary to prevent wrong, fraud or injustice being done. The scope of permissive review of the record evidence in a trial before an administrative agency should be broader than the scope of such review of either the verdict of a jury or the findings of a trial Court. While the administrative agency should be, and generally is an expert trier of facts—and weight thereto should be given accordingly—nevertheless the administrative officers do not have that degree of detachment from the issue or the parties or necessarily absence of bias that a jury or a trial judge is supposed to have.[19]

The Report states that the phrase "clearly erroneous" in the review

(Continued on page 513)

12. 62 A.B.A. Rep. (1937) 848.
13. 62 A.B.A. Rep. (1937) 272.
14. 62 A.B.A. Rep. (1937) 849.
15. For debates and House of Delegates action, see 62 A.B.A. Rep. (1937) 262-290.
16. 63 A.B.A. Rep. (1938) 338, *referring to* New York *Times*, February 13, 1931, quoted in Vanderbilt: "The Place of the Administrative Tribunal in our Legal System", 24 A.B.A.J. 267, 269.
17. 63 A.B.A. Rep. (1938) 367; lines 41 and 40, respectively.
18. 64 A.B.A. Rep. (1939) 281. In the Senate the bill was S. 915, 76th Congress, and the House bill was H.R. 6324. Congressman Celler actually introduced the Bar Association bill in the House as H.R. 4236, but this bill was superseded by Walter's introduction of H.R. 6324.
19. 64 A.B.A. Rep. (1939) 613.

7

The Inns of Court:

Famed Shrines of the Law Will Be Restored

by **Douglas H. Gordon** • of the Maryland Bar

■ From his long interest in the history of our profession and the institutions of law, Mr. Gordon has described the Inns of Court and the damage done to them by the Nazi air-raids on London and the ensuing conflagrations, principally in 1940. Last summer he was in England and France, and visited Herbert Hansworth, of 1 Brick Court, Middle Temple. With the latter as guide, Mr. Gordon examined closely the four Inns, and took photographs, of which three are reproduced with this article. Gray's Inn Hall is shown as entirely gutted; likewise, Temple Church as seen across the ruins of Sir Christopher Wren's Cloisters, which were entirely destroyed; and the Middle Temple Hall was badly damaged. He could not get a picture of the Middle Temple Hall, as the east end, where the destruction was the greatest, is closed in by other buildings. There the fire evidently started on the roof, as it usually did. It was put out before the building was consumed, and a photograph of the exterior would not have given an adequate idea of the damage which this beautiful edifice suffered.

Mr. Gordon states that the working libraries of the Inns were largely destroyed, although the rare volumes were for the most part saved. A joint temporary library was being set up for use by the Inner and Middle Temple. The salvaged library of Lincoln's Inn is available also for Gray's Inn, where there are fewer lawyers than in the other three Inns.

Our historiographer-photographer is a lawyer in active practice in Baltimore. He will be remembered by our readers as the author of the notable "centenary review" of Lord Campbell's *Lives of the Chancellors*, which was published in our November, 1945, issue (31 A.B.A.J. 547).

Mr. Gordon's narration of the history of the Inns, the part they have played in the development of English and American law and institutions, and the devastation wrought by Nazi bombs and incendiaries, will stir our readers. The sympathetic interest of American lawyers in what has befallen these shrines and in the hopes and plans for their restoration, was felicitously expressed in 1945 by John W. Davis, former President of our Association, in a letter to David A. Simmons, then President of the Association (31 A.B.A.J. 115; February 1946). Mr. Davis' letter led to the appointment of a Special Committee of our Association, of which he is the Chairman, to canvass the means by which American lawyers and others could be given an opportunity to contribute in some way toward the restoration of the Inns or their libraries, in token of the kinship of the lawyers of the two lands. Contributions for that purpose have lately been ruled by the Treasury Department to be deductible for tax purposes. It is expected that Mr. Davis' Committee will make known in May its plans and suggestions. Mr. Gordon's present article thus gives a timely background for this activity of our Association.

■ On August 13, 1608, King James I granted in perpetuity the Inner and the Middle Temple to the two societies of Benchers (or senior members) and Barristers and students, who had then already been occupying them for a quarter of a millennium. After reciting his own munificence, he called these objects of his bounty "two out of those four colleges the most famous of all Europe" for the study of the law.

In fact, the four Colleges, or more properly societies, or as they are usually called, Inns of Court—Lincoln's Inn, Gray's Inn, the Inner Temple and the Middle Temple—have over the centuries been a center, the like of which is unknown elsewhere in the world, for the combined study and practice of the law, for the residence of students, lawyers and others, and for the regulation of the Bar. As a means by which the Anglo-American system of law was created and carried forward, they are deserving of even more fame than was ac-

DOUGLAS H. GORDON

corded them by their royal grantor and admirer.

In addition to lawyers, literary men over the centuries have made their homes in the Inns and have peopled them with their characters. Statesmen have lived in them. The most eminent architects and artists have designed and decorated them. Indeed, the life of every American, whether lawyer or layman, however slight his connection with the Mother Country, has been in some manner substantially influenced by these ancient and honored institutions. They are landmarks outstanding in the intellectual history of England and of the world.

The Inns Damaged During Air Raids

Yet at the very moment when humanity hopes for a universal rule of laws, not men, and for a world-wide application of the ideals of integrity created and preserved by the Inns of Court, the Inns themselves are largely in ruins as a result of the air raids on London, of which they were the most illustrious victims.

In each Inn of Court, in addition to the buildings devoted to living quarters and offices, there are three essentials: A hall, a library, and a chapel. Lincoln's Inn has lost none of the three. The other Inns of Court have lost all.

"Lincoln's Inn suffered damage only in its handsome Palladian "Stone Buildings". These received a direct hit from a high explosive bomb, and were also injured by fire. But only a small portion was destroyed. Symbolically the Sun-dial, placed on the building's western wall at the time when the younger Pitt was Treasurer, (and therefore bearing his initials), survives as a memorial to the forger of the alliance that ended England's previous threat of invasion, and destroyed the empire of Napoleon.

The Chapel, completed in 1623 from the designs of Inigo Jones, remains uninjured. John Donne laid its cornerstone and preached the sermon upon its dedication. Archbishop Tillotson and Bishop Heber were among his successors. The other old buildings, upon which or upon the Chapel it is variously said that Ben Jonson worked as a mason, likewise escaped injury. Also intact are the modern Hall and Library dedicated in 1845 by Queen Victoria and Prince Albert.

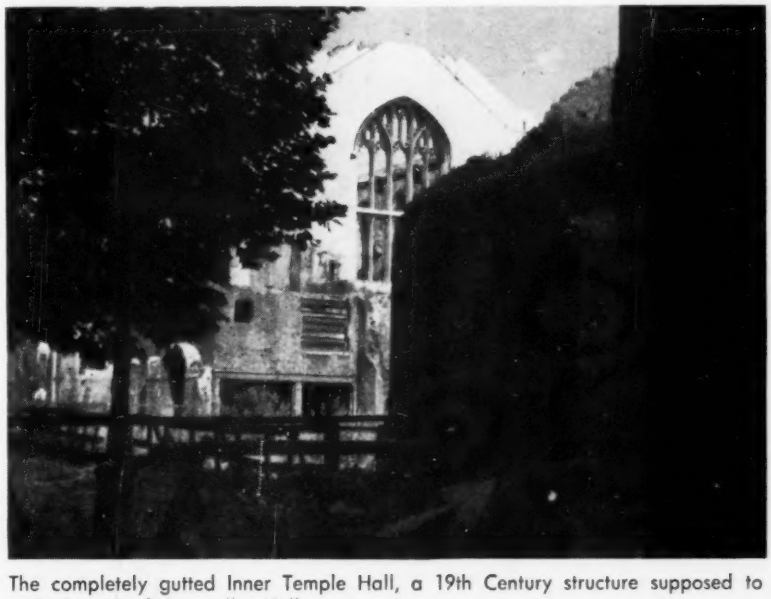
Members of Lincoln's Inn included Sir Thomas More, author, Chancellor, and latterly Saint, Chief Justice Hale, Jeremy Bentham, and ten of Victoria's fourteen Chancellors. Outstanding among these were Lyndhurst, Brougham and Campbell, who had also served as Chief Justice and the fame of whose extraordinary legal career was exceeded by that of his witty and mocking biographies of previous Chancellors and Chief Justices. Literary men of Lincoln's Inn included such diverse figures as Lord Lytton and Wilkie Collins, Buckle and Rider Haggard, Anthony Hope Hawkins and Augustine Birrell.

Its outstanding public figures were equally of opposite views: Sir Robert Walpole and William Pitt, George Canning and Daniel O'Connell and Benjamin Disraeli and William Evart Gladstone. With the exception of the Stone Buildings, the scene of their activities is untouched except by the necessities of peaceful growth. The contrast of Lincoln's Inn with the other three Inns of Court could hardly be more complete.

Extensive Ruin of Gray's Inn

Amidst the extensive ruins of Gray's Inn remain standing the walls of the Hall, built in 1556. A century and a half before, Sir William Gascoigne, who had studied at Gray's Inn, committed the Prince of Wales, afterwards Henry V, for contempt of Court. His bold action strengthened the principle of judicial independence, and gained him immortality through Shakespeare's account of it in *The Second Part of King Henry IV*.

In Elizabethan days, Gray's Inn



The completely gutted Inner Temple Hall, a 19th Century structure supposed to embody part of the earlier Hall.

was the most fashionable of the four societies. The foundations of its prestige were laid by Sir William Cecil, Elizabeth's Secretary of State, Sir Gilbert Gerrard, her Attorney General, Sir Nicholas Bacon, her Lord Keeper of the Great Seal, Sir Francis Walsingham, the Chief of her Secret Service, and Lord Howard of Effingham, Commander of the English fleet which destroyed the Armada.

Many were the masques, revels and dances which the Queen attended there. Shakespeare made a nearby lane the scene, in Justice Shallow's madcap youth, of his fight with the fruiterer Samson Stockfish. In the famous revels of 1594, *The Comedy of Errors* was acted in the now burnt-out Hall. Gray's Inn had also the honor of the membership of Sir Philip Sidney, at once an important figure in English literature and the flower of English chivalry.

Sir Francis Bacon and Gray's Inn

But the roster of the sons of Gray's Inn must always be headed by the name of Sir Francis Bacon. He was entered by his father, Lord Keeper Bacon, in 1576, became a Bencher ten years later, and ultimately Treasurer. Combining a career of letters and law, both of which centered in Gray's Inn, he readily received recognition as England's greatest philosopher, and after many vexatious disappointments, became Lord Keeper of the Great Seal.

The great procession which honored his installation in office at Westminster Hall began at Gray's Inn. In 1617 he was made Chancellor and raised to the peerage as Baron Verulam. In 1620 he published the immortal *Novum Organum*. The following year his prosperity was at its height and he was created Viscount St. Albans. In that same year he was impeached, removed from office and publicly disgraced. He returned to Gray's Inn, still revered for his towering intellect. Here he spent his old age, in the spot where his splendid masques had contributed to his worldly advancement.

The results of his passion for gardening which he called "the purest of human pleasures", still survive in the arrangement of the present gardens, where Pepys took his oft-vexed wife to observe the latest fashions, and where Sir Roger de Coverley loved to walk. Amidst the surroundings of his youthful legal studies, many of Bacon's literary works were written. Upon these his glory securely rests, doing perpetual honor to the Society of which he was the most eminent member.

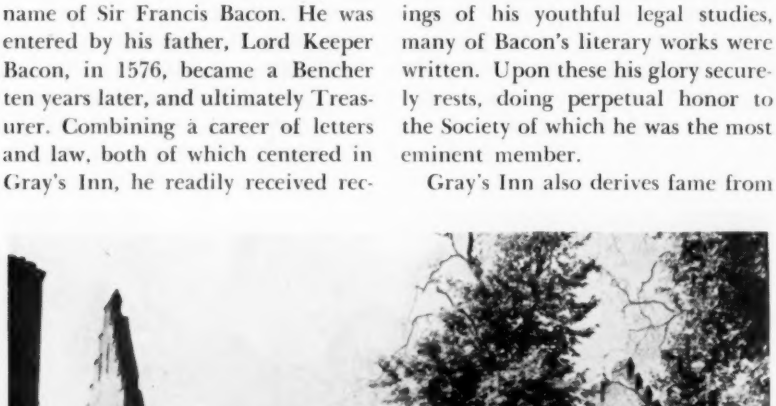
Gray's Inn also derives fame from the memory of two members in subsequent centuries. Lord Chief Justice Holt refused to bow to superstition, as his predecessor Sir William Gascoigne had declined to recognize royal prerogative. He ended the witchcraft trials by detecting the imposture of prosecuting witnesses, and by punishing them rather than their intended victims. Sir Samuel Romilly in the early years of the last century, by his enlightened efforts to bring about reforms, helped relax the severity of the criminal law throughout the world.

Four centuries before Bacon became a Bencher and participated in the studies and revels in the Hall of Gray's Inn, the Temple Church was on February 10, 1185, consecrated and dedicated to the Virgin Mary by Heraclius, Patriarch of Jerusalem. Built in circular form, it is said, to resemble the Temple of Solomon, where certain crusaders had at the capture of Jerusalem in 1099 formed a religious but fighting organization to protect pilgrims and the Holy City itself, the Temple Church was a symbol of the prosperity of the Knights Templars. With the support of the nobility of all of Europe, the Templars' financial strength continued to grow until it reached a scale which attracted governmental notice. In 1312 Edward II dissolved the Order and seized its funds, buildings and broad jousting ground extending to the Thames and now the garden of the Inner Temple. Edmund Spenser in Elizabethan days quaintly described the Temple, and most euphemistically passed over this royal *coup de main* in the much quoted lines of his Prothalamion:

> those bricky towers
> Where now the studious lawyers have their bowers
> There whylome wont the Temple Knights to byde
> Till they decayed through pride.

The Knights Templar and the Temple Church

Ultimately the Temple and its connected buildings were turned over to the Knights Hospitallers of St. John of Jerusalem. This Order first



Gray's Inn Hall

A view of the Temple Church seen through the wreckage of Sir Christopher Wren's Cloisters.

rented the buildings to the Societies of the Inner and Middle Temple. The Crown became owner and was the lawyers' landlord from the time when Henry VIII dissolved the Order in 1539 until the self-recorded munificence of James I in 1608.

The Temple Church, extended eastward in subsequent centuries, has for some 500 years been the joint Chapel of the Middle Temple and Inner Temple. The members of the former by precise legal division are entitled to the northern half; those of the latter, to the southern half. The original circular part was long utilized as a place for the meeting of lawyers and clients, and is so described in *Hudibras*.

Only the Walls of Temple Church Remain

Pepys referred with pleasure to the monuments in the Temple Church. In his day it escaped the Great London Fire and another severe fire in 1678. Today only the walls of the Church remain. Other losses in the Inner Temple are the nineteenth century Gothic Library and Hall, the gracious Master's House; called by its admirers "the most delectable dwelling in all London", and numerous office and residential buildings.

Chaucer is traditionally supposed to have been an Inner Temple student, Sir Thomas Sackville was of the Inner Temple. The first English tragedy, *Gorboduc*, written in part by him, was played there in 1561 for the benefit of Queen Elizabeth, probably in the old Hall replaced in the nineteenth century. Dr. Samuel Johnson and his slave and admirer, James Boswell, but for whose biography of his hero both would now be forgotten, resided in the Inner Temple.

Nearby is buried Johnson's friend Oliver Goldsmith, whose final home, 2 Brick Court, Middle Temple, was destroyed in the raids. Another Inner Temple loss is Crown Office Row, where in 1775 Charles Lamb was born. He lived most of his life at 4 Inner Temple Lane. To his modest apartments thronged all of the artists, writers, poets, and painters of one of England's richest literary periods. Of the Temple, in his essay, *The Old Benchers*, Lamb said: "Indeed it is the most elegant spot in the metropolis".

Among the legal celebrities of the Inner Temple are Sir Edward Coke, black-letter lawyer *par excellence*, and bold defier of royal prerogative, the learned John Selden, the arch-conservative Lord Mansfield, the first of England's many Scotch Chief Justices, his liberal rival, dear to the American Colonists, Lord Camden, and Lord Abinger, of whom the Duke of Wellington said that having him as counsel was like having a thirteenth juror, but who is now chiefly remembered as the father-in-law of Lord Campbell, ever memorable for his *Lives*.

Severe Damage to the Middle Temple Hall

The third great loss of the Inns of Court is the Middle Temple Hall. Luckily, its severe damage stopped far short of complete destruction. This magnificent example of Elizabethan architecture was built in 1572. It is of outstanding literary interest because in the Revels of February, 1602, on its stage, which escaped the fire-bombs of the air raids, Shakespeare's *Twelfth Night* was played, presumably with Shakespeare himself as a member of the cast. Queen Elizabeth no doubt danced many times in the Hall, for Sir Christopher Hatton began in the Middle Temple his legal career which culminated in his elevation to the lofty position of Chancellor, with admittedly no other qualification than his talents as a dancer.

Edmund Plowden, the most learned lawyer of his day, was Treasurer at the time of the building of the Hall. He would not abandon the Catholic cause even for the Chancellorship. Equally unyielding was Chief Justice Popham, who with Lord Keeper Ellesmere was imprisoned by Essex during his abortive rebellion. He honorably refused the offer of his liberty unless Ellesmere were also released. And he lived to tell the tale. He also gave testimony at the treason trial of the associates of Essex as to what, while in Essex's hands, he "well learned through the keyhole"—a customarily unheroic method of acquiring knowledge of which his proved bravery made him not feel ashamed.

Celebrities of the Middle Temple

Of the Middle Temple also was Sir William Blackstone who systematized the previously chaotic common law of England and in his *Commentaries* showed what is rare

among legal writers—a distinguished literary style worthy, in his case, of the Augustan age in which he lived.

The Middle Temple produced Lord Clarendon who wrote the great *History of the Rebellion* and was the author of the restoration of Charles II, and Lord Somers, important as a constitutional writer but more so for ending the Stuart dynasty and bringing over William and Mary to preserve the liberties of England. Among the men of letters of the Middle Temple were Beaumont, Ford, Congreve, Wycherley, Fielding, de Quincey, Dickens and Thackeray whose *alter ego* Pendennis with his friend Warrington resided in Lamb Building.

To Americans the Middle Temple is of particular interest because of its connection with the great Elizabethan navigators. Sir Francis Drake was made an honorary member in 1582 and was welcomed in the Hall upon his victorious return from the West Indies in 1586. Sir Martin Frobisher and Sir John Hawkins were honorary members.

Elizabethan Navigators and Early American History

Sir Walter Raleigh, a member since 1575, placed in command of his expedition in 1602 which discovered and named Cape Cod, Elizabeth's Island and Martha's Vineyard, another Middle Templar, Bartholomew Gosnold. Gosnold also headed the expedition which named the Virginia Capes after Prince Henry and Prince Charles and which established the first permanent English settlement at Jamestown. And Richard Hakluyt, from the library and maps of his cousin and namesake in the Middle Temple, acquired the enthusiasm for seafarers seeking new lands and adventures that secured his own as well as his heroes' fame through his three noble folios of *The Principal Navigations, Voyages, Traffiques and Discoveries of the English Nation.*

American Lawyers and the Middle Temple

A more direct American connection is in the five Middle Temple lawyers who signed the Declaration of Independence — Edward Rutledge, Thomas Lynch, Thomas Heyward and Arthur Middleton, all of South Carolina, and Thomas McKean, a Pennsylvanian by birth, later Governor of his native State, but who was practising in Delaware and signed the Declaration as a representative of that State. Maryland's Charles Carroll of Carrollton probably also studied for a short while in the Middle Temple. William Paca, another Maryland signer, was of the Inner Temple.

Through these signers and many other important figures of the colonial period, the Inns of Court profoundly influenced the development of the Colonies into independent States. They also give rise to the idea of an independent judiciary, basic in our State and federal Constitutions. Their literary and historical heritage has likewise become part of the background of every American lawyer.

In addition, the highest standards of professional conduct have been developed by the Societies through their unique combination of the study and practice of the law in the very birthplace of the Anglo-American legal system. These standards have guided successive generations of lawyers in the old and new countries.

The Inns of Court Will Rise from Their Ruins

There can be no doubt that the three severely damaged Inns of Court will rise from the present disaster as they did from many that were less severe in the past. The need for the work they have accomplished over the centuries demands their complete restoration.

In a few years, what survives of their ancient beauty, with new buildings replacing the present ruins, will become again "the most elegant spot in the metropolis" and a legal center "the most celebrated of all Europe", and of enduring value to the Bar of America.

Committee on Law Lists

The Special Committee on Law Lists has issued letters of intention to the Legal Directories Publishing Company, 5225 Wilshire Boulevard, Los Angeles 36, California, for:

Illinois Legal Directory
Pennsylvania Legal Directory

Both these letters of intention bear the expiration date of December 31, 1947.

In issuing any letter of intention, the Committee is not indicating that the list will actually be issued or that it will conform to the Rules and Standards as to Law Lists. A letter of intention is issued only upon representations made by the publisher that the list will conform to the Rules and Standards.

See 33 A.B.A.J. 200, 309; February, April, 1947, for a list of other certificates of compliance and letters of intention which have been issued by the Committee.

Resolutions Committee:

Members Appointed for 1947 Annual Meeting

■ An important part of our Association's democratic processes is the Standing Committee on Resolutions, which receives, hears, considers and reports on Resolutions offered by individual members of the Association, so that any lawyer in our ranks may have a report, debate and vote on any Resolution he chooses to submit, if it is within the chartered objects of our Association.

A representative Committee for the Cleveland Annual Meeting next September 22-26, has been appointed. Roy A. Bronson, of California, is the new Chairman; it has many new members. Any member of our Association may now file with the Committee at any time a Resolution for consideration in Cleveland.

■ President Carl B. Rix has appointed Roy A. Bronson, of 220 Bush Street, San Francisco 4, California, as the Chairman of the Standing Committee on Resolutions for the present Association year, with the following members:

Joseph F. Berry, 750 Main Street, Hartford 3, Conn.

James E. Brenner, Law School, Stanford University, Calif.

Allen B. Endicott, Jr., Guarantee Trust Building, Atlantic City, N. J.

William J. Fitzgerald, Scranton Life Building, Scranton, Pa.

Harold J. Gallagher, 15 Broad Street, New York 5, N. Y.

Glenn C. Gillespie, Peoples State Building, Pontiac, Mich.

Stephen E. Hurley, 135 South LaSalle Street, Chicago 3, Ill.

William H. King, Jr., 209 South LaSalle Street, Chicago 4, Ill.

G. Carl Kuelthau, Wells Building, Milwaukee 2, Wis.

Jacob M. Lashly, 705 Olive Street, St. Louis 1, Mo.

Raymer F. Maguire, Florida Bank Building, Orlando, Fla.

David F. Maxwell, Packard Building, Philadelphia 2, Pa.

James R. Morford, Delaware Trust Building, Wilmington 28, Del.

Frederick H. Stinchfield, First National Soo Line Building, Minneapolis 2, Minn.

H. W. Story, Allis Chalmers Manufacturing Co., Box 512, Milwaukee 1, Wis.

Kenneth Teasdale, Boatmen's Bank Building, St. Louis 2, Mo.

Frank H. Terrell, Fidelity Building, Kansas City 6, Mo.

Robert W. Upton, 14 Park Street, Concord, N. H.

Hereward Wake, Box 777, Westport, Conn.

Gifford K. Wright, First National Bank Building, Pittsburgh 22, Pa.

Under Article V, Section 2, of the By-laws as amended at the 1946 Annual Meeting (33 A.B.A.J. 184; February, 1947) any member of the Association may file with this Committee at any time between Annual Meetings any Resolution which embodies his views on any subject which he deems to be within the province of the Association and on which he wishes the Association to take action. Resolutions thus filed will be announced by the Committee Chairman at the first meeting of the Assembly at the 1947 Annual Meeting in Cleveland, Ohio, on September 22-26. Resolutions may also, as heretofore, be offered from the floor at that session. Proponents of Resolutions should note and comply with the new requirements of Article V, Section 2, of the By-laws, as to their form and length.

ROY A. BRONSON

Proponents and opponents of Resolutions filed during the year or at the opening session will be granted a public hearing in Cleveland. The Resolutions will be reported on by the Committee at the "open forum" session of the Assembly. If adopted by the Assembly, they require the

concurrent action of the House of Delegates, before they have effect as an expression of the views of the Association rather than of the Assembly alone.

Starting with Judge L. B. Day, of the Supreme Court of Nebraska in 1936 as its first Chairman, the Resolutions Committee has been headed by well-known lawyers, including former Attorney General Homer Cummings, William Clarke Mason, Judge Hatton W. Sumners, Frederick H. Stinchfield, and Harold J. Gallagher.

The new Chairman of the Committee heads the firm of Bronson, Bronson and McKinnon. He has been active in the California State Bar and in the San Francisco Bar Association, of which he was the energetic President in 1945, during the San Francisco Conference of The United Nations. Under his leadership, both hospitality and facilities were extensively furnished, to the representatives of our Association and other American lawyers attending the Conference, as well as to the lawyers from many other countries who were in the delegations or their advisory staffs.

Traffic Court School—June 3-5, New York City

■ The first of a series of Traffic Court Schools to be conducted by the American Bar Association and Northwestern University Traffic Institute will be held at the New York University School of Law, Washington Square, New York City on June 3-5. The endorsement of the American Bar Association to programs of this type is contained in a resolution unanimously adopted by the House of Delegates, February 25, 1947 (33 A.B.A.J. 403; April, 1947).

Attendance at the conference is open to all judges in courts which try traffic cases, to prosecutors assigned to such courts and to persons about to assume the duties of such positions. The registration fee is $5.00.

This conference is designed to help judges and prosecutors become more familiar with and to develop and apply those policies and procedures which will assure proper treatment of traffic violators.

The following topics are to be covered:

The Traffic Problem and Its Control—Historical development, severity and significance, causative factors, control principles and techniques, current programs of traffic engineering, enforcement and education.

Traffic Regulations—Requirements, interpretations, applications, trends toward improvement and uniformity.

Criminal Law in Traffic Cases—Important points relating to arrest and prosecution which are pertinent in traffic cases, especially prosecution arising from accidents.

Law of Evidence in Traffic Cases—Applications in traffic violator trials.

Scientific Evidence—Legal and Technical aspects of scientific tests for intoxication, speed determination from skidmarks, hit-run vehicle identification by physical evidence and other scientific and technical aids to the detection and prosecution of traffic violators.

Police Operations—Principles, policies and practices in traffic patrol, violator detection and apprehension, accident investigation, and case preparation.

Prosecutors' Functions—Pretrial coordination with police, trial preparation, examination of witnesses, introduction of evidence, prevention of irregularities.

Court Procedure—Problems and requirements peculiar to or of special significance in traffic cases.

Penalization—Objectives and values, types of legal and "extra-legal" penalties, severity of penalties and uniformity of penalties.

The Court and the Public—Public attitudes and factors which influence them, the responsibility of the prosecutor and the judge.

The Driver—Physical, mental and psychological factors affecting performance; means of improving knowledge, skill and attitude.

The Chairman of the Conference will be Arthur T. Vanderbilt, Dean, New York University School of Law; Vice Chairman, Russell D. Niles, Assistant Dean, New York University School of Law. The Conference Director is Professor J. Walter McKenna, New York University, School of Law.

The Technical Staff is as follows: Franklin M. Kreml, Director, Northwestern University Traffic Institute; Secretary, James P. Economos, Traffic Court Committees, American Bar Association.

The Advisory Staff for this Conference is Roscoe Pound, Director, National Conference of Judicial Councils; Alfred Morrison, Editor, "Justice Court Topics", Angola, New York; Sidney J. Williams, Assistant to the President, National Safety Council; W. Earl Hall, Chairman, National Committee for Traffic Safety; W. Dean Keefer, Kemper Foundation for Traffic Safety.

Requests for information should be addressed to Dean Arthur T. Vanderbilt, New York University School of Law, Washington Square, New York City.

9

Legal Aid and Advice:

The Rushcliffe Report as a Land-Mark

by **Reginald Heber Smith** • of the Massachusetts Bar

■ For lawyers, law schools, and Bar Associations, in the United States as well as in England, the Report by the Rushcliffe Committee appointed by the Lord Chancellor is a land-mark. The impact of the war on legal aid in England, in Canada, and in our country, is pointed up. The Report also goes straight into the problem of "legal referral and service offices for persons of moderate means."

Reginald Heber Smith has written for us a summary and review of the Report. With it he has joined a review of Robert Egerton's book on legal aid in England. Already the Rushcliffe Report is being translated into action. When T. C. Lunn, of the Law Society, was in the United States in March, he said that the Law Society already has a thousand solicitors working under its direction, making competent legal advice and assistance available to people without means.

An arresting fact is that, as the Rushcliffe Report recommends, the legal aid expenses, including the salaries of these lawyers, are being paid by the Treasury. But that is only half the story. The Report is adamant for the proposition that legal aid must be conducted, not by Government, but by the organized Bar. In America, it is not too late for the organized Bar to accept and have the full responsibility for financing as well as conducting legal aid. The challenge is squarely before the profession of law.

■ The Rushcliffe Committee Report and the Egerton book together[1] tell of the inadequacy of legal aid work in England and propose radical measures for its reorganization and wide extension.

Mr. Egerton wrote from his long experience as Registrar of the largest Free Legal Advice Centre in London. The unhappy facts he recites are confirmed by the official Report of the Committee headed by Lord Rushcliffe. Both agree on the necessity for drastic improvement; each recommends substantially the same remedies.

The Rushcliffe Committee was appointed by the Lord Chancellor on May 25, 1944. Its report was presented to Parliament in May, 1945. It is more than a coincidence that these same twelve months spanned one of the most critical periods in world history, beginning with the invasion of Normandy and ending with Germany's capitulation at Berlin.

Concern for legal aid was a part of England's supreme all-out war effort. "It was the Army which first realized that it was necessary to furnish free legal advice to the soldiers if their morale was not to be affected; it has taken the war to bring the lesson home to those in authority," writes Professor A. L. Goodhart in his Preface to *Legal Aid*.

Whether this close relationship between legal aid and military morale existed in all armies I do not know. It was so in Canada, and we are familiar with the millions of soldiers' and sailors' cases cared for by our own Army and Navy Legal Assistance Officers, with the active cooperation of the organized Bar, mobilized by our own Association.

Why legal aid should have developed so slowly in the land that gave birth to the ideal of freedom and equality of justice for all men is hard to understand. Conditions were so bad that Gurney Champion in his *Justice and the Poor in England* ironically proposed that Parliament should, in so far as the poor were concerned, repeal the fortieth paragraph of Magna Carta—"to no man will we deny, sell or delay right or justice."

Early Steps in America Were Soundly Taken

What enabled us to do somewhat better in America was that our legal aid pioneers in New York and Chicago had the wisdom at the outset to

1. *Report of the Committee on Legal Aid and Legal Advice in England and Wales (The Rushcliffe Report).* 2nd. Ed. London: H. M. Stationery Office. 1946. 9d. Pages iv, 48. *Legal Aid.* By Robert Egerton. New York: Oxford University Press. 1947. $3.75. Pages xvi, 160.

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establish legal aid *offices* with paid staffs. If that seems a self-evident principle of sound organization, then let us keep it in mind when we begin to establish more adequate legal facilities for persons of moderate means.

The largest Legal Advice Centre in London was, before the war, open only one evening a week. Advice was given, and that was all. The solicitors received no compensation; they rendered this public service after a full day's work in their own offices. There were no stenographers; hence no letters were written. There were no negotiations with opposing parties; and so disputes that could have been adjusted were not settled.

World War II Spurred Legal Aid in England

German bombs changed that. In the official words of the Committee report:

> At the outbreak of war, when all evening activities stopped, the centre tried the experiment of opening for a short period during the day, and from this has sprung the interesting development of a whole-time Poor Man's Lawyer centre staffed mainly by full-time solicitors who receive small salaries and where whole-time typing and clerical assistants are also employed. This has facilitated an increase in letter-writing and has also made it possible for the centre to do much more by way of negotiation.

"Why did we have to wait until the war came before recognizing how serious this problem was?" asks Professor Goodhart. The answer, as Mr. Egerton makes clear, is attributable to muddy thinking—from which we are not immune in the United States—about what lawyers can and cannot do. It *is* a lawyer's professional obligation to serve needy clients freely as much as he can. But it is *impossible* for a lawyer to serve many clients without being paid; that is simply a short-cut to bankruptcy. Mr. Egerton continues: "The legal profession is open to criticism, not because it has been ungenerous, but because it has closed its eyes to a problem which it, in particular, should have recognized."

That is the fundamental truth. The Bar cannot handle thousands of cases *gratis*, but it can solve the problem. It can devise, construct and operate the necessary machinery.

Recommendations of the Rushcliffe Committee

The Rushcliffe Committee urges "the establishment of Legal Aid Centres in appropriate towns and cities throughout the country."

Facing the economic problem squarely, it states: "The cost of the scheme should be borne by the state."

Before American lawyers assume that conclusion is just a reflection of the "statism" of the present Labor Government in England, let them listen to the next finding:

"But the scheme should *not* be administered either as a department of state or by local authorities." (Italics mine).

The reason is given by Mr. Egerton in simple, unequivocal words, valid not only in England but also in the United States and throughout the world:

> The independence of the legal profession is a valuable protection for the individual against encroachments on his liberty by the state. The matters on which he requires professional assistance frequently arise from the action of the state.

There is only one true solution: *Although the whole cost of legal aid is not the responsibility of lawyers, the conduct and supervision of the work is the professional obligation of the organized Bar.*

As the Rushcliffe Committee Report says: "The legal profession should be responsible for the administration. The Law Society should be answerable to the Lord Chancellor for the administration."

Advanced Ground Taken by the Report

The Report takes a stand so far in advance of our own present thinking and action that we need to read, mark and inwardly digest its first three findings:

> (1) Legal aid should be available in all Courts and in such manner as will enable persons in need to have access to the professional help they require;
> (2) This provision should not be limited to those who are normally classed as poor but should include a wider income group; and
> (3) Those who cannot afford to pay anything for legal aid should receive this free of cost. There should be a scale of contributions for those who can pay something toward costs.

The Report presents detailed plans for what we in this country call "legal service offices for persons of moderate means." Their recapitulation would require more space than is permissible in this review; but they will repay study by the Committee which the American Bar Association has charged with the responsibility for implementing the 1946 Resolution by the House of Delegates (33 A.B.A.J. 43; January, 1947):

> It is a fundamental duty of the Bar to see to it that all persons requiring legal advice be able to obtain it, irrespective of their economic status.

A Similar Study Should Be Made in America

The emergency nature of this problem and the magnitude of its scope have been given explicit statement by Mr. Alex Elson, of the Illinois Bar, in his thorough review of the Rushcliffe Report, which was published in the February issue of the *University of Chicago Law Review* (Vol. 13, pages 131 *et seq.*).

Applying the lesson of English experience to present-day conditions in the United States, Mr. Elson believes that the Attorney General or the Supreme Court should appoint a committee "to make the same kind

of intensive and imaginative study of the adequacy of legal representation in this country as that made in England."

It may well be that progress will most quickly be made by relying on the broad study of law and legal services in contemporary America proposed by the Section of Legal Education, approved by the President and Board of Governors of our Association, and for which a substantial grant of funds is available.

Judge Conway's Commendation of the Report

Speaking before the New York State Bar Association on January 25, Judge Albert Conway, of the New York Court of Appeals, devoted the latter part of his address to an eloquent plea for legal aid. He spoke of the "hundred million or more" of people who do not have good access to lawyers' services. Concerning the Rushcliffe Report he said:

> Sometimes we see things more clearly by lifting our eyes from our surroundings and viewing what is occurring elsewhere. In England a committee consisting of leaders of the bar and in social reform headed by Lord Rushcliffe was appointed in London on May 25, 1944, curiously enough when the war was at its height, "to inquire what facilities at present exist in England and Wales for giving legal advice and assistance to Poor Persons, and to make such recommendations as appear to be desirable for the purpose of securing that Poor Persons in need of legal advice may have such facilities at their disposal . . . ." In May of 1945, one year later, there was made the so-called Rushcliffe Report, by the Committee, to the Lord High Chancellor and by him presented to Parliament. I recommend most earnestly a reading of it and of the recommendations contained therein.

Equal and Exact Justice for All Persons

This problem of equal and exact justice according to law, for all persons in a democracy, is our root problem. It lies at the heart of everything else. I still believe firmly in the truth of the following words which I ventured to address to our Association a decade ago:

> There can be an honest difference of opinion as to whether the state owes an affirmative duty to its citizens to keep them in good health. There can be no argument against the proposition that the state is bound to see that its citizens receive justice. That, and defense against foreign aggression, are the two primary reasons why government exists.

"The Protection of Human Liberty Under God by Constitutional Government Under Law"

■ "I believe very deeply that the protection of human liberty under God by constitutional government under law as we have developed it in this country is the finest flower of the mind of man.

"Our country is one of the few Nations on earth where every one of us is still free to choose his own mode of life, to think, to speak, to worship as he will. We still have the unique privilege in this country of electing at regular intervals those who will represent us in government and we have the priceless privilege of knowing that if we don't like them we can put them out of office on a given date in the comparatively near future.

* * *

"No man should take an oath of office to support the Constitution in which he believes if he's willing to betray it for political purposes or to allow the institution of free government to be undermined or destroyed by its enemies.

* * *

"Every weak government is game for the Communists, who conspire to weaken it and then use its weakness to destroy it and put a dictatorship in its place. One of their most useful devices is the strike which paralyzes government, for when government stops functioning then their small, well-disciplined minority can take over. The fate of Nation after Nation, all over the world, still hangs in the balance. There cannot, there will not, there must not be any such paralysis of government in our State or our Nation."

From address by Thomas E. Dewey,
Governor of the State of New York,
member of the American Bar Association since 1935.

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Kimbrough Stone:

Senior Circuit Judge – Eighth Circuit

■ Judge Kimbrough Stone's service as a United States Circuit Judge spans more than half the history of the Circuit Court of Appeals for the Eighth Circuit. Of the fifty-six years during which that tribunal has been in existence, he has been a member of it for more than thirty years. During more than one-third of the life of the Court, he has been also its Senior Circuit Judge.

Of the fifty-nine judges who now compose the eleven Courts of Appeals of the United States, Judge Stone has been a Circuit Judge longer than any other except Judge Evan Evans of the Seventh Circuit, whose appointment preceded his by some months. Judge Stone was appointed to the Court in December of 1916 and took office in January of 1917. Among the present Senior Judges of the Circuits, he has served longer as a Senior Circuit Judge than any other. There have been four Chief Justices of the United States who have presided over the Conference of Senior Circuit Judges while he has been a member of the Conference.

The Circuit Court of Appeals for the Eighth Circuit consists of the following:
Wiley Blount Rutledge, Circuit Justice
Kimbrough Stone, Senior Circuit Judge
Archibald K. Gardner
John B. Sanborn
Joseph W. Woodrough
Seth Thomas
Harvey M. Johnsen
Walter G. Riddick Circuit Judges.

There are ten federal districts and nineteen United States District Judges on active service in the Eighth Circuit, with two retired District Judges.

Sketch of Judge Stone's Career

■ Judge Stone became Senior Circuit Judge of the Eighth Circuit in 1928. The Eighth Circuit has had only three Senior Circuit Judges since it was created in 1891. During its history, there have been nineteen Circuit Judges who have been members of the Court. Judge Stone has served and sat with all of these Judges but four.

Until 1929, when the Tenth Circuit was created out of six of its Western and Southern States, the Eighth Circuit had consisted of thirteen States, constituting more than a fourth of those in the Union and almost one-third of the National area. During the first twelve years of Judge Stone's service, the Court thus had to deal with all the problems of the law, falling within federal jurisdiction, for this vast agricultural, industrial, irrigation, mineral, public-lands and Indian-rights region. There remain in the Eighth Circuit the seven States of Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Missouri and Arkansas, which constitute a middle phase in the economic, industrial and social life of the American people, and which together are deemed to be perhaps as nearly representative of the general problems of the Nation as any present Circuit area.

Characteristics of the Business of the Eighth Circuit

Agriculture is, of course, the principal pursuit of the area; but with it go the complexities of regulating carriers, stock yards, packing houses, grain exchanges, milk markets, and other fields of federal jurisdiction. Manufacturing, mining, lumbering, navigation, flood control, drainage, hydro-electric power and irrigation developments—all are important but not over-balanced activities in a part or parts of the area. These give rise to a rather wide variety of general litigation in the field of diversity of citizenship; and they produce also their natural complement of labor, tax, patent and other direct federal questions.

The Eighth has always been one of the heavier Circuits in the volume of its appellate business. Thus, at the beginning of the present fiscal year, the statistics of the Administrative Office show that the Court then had the fifth highest number of cases on its docket, with a difference of only two and five cases respectively from the Circuits in fourth and third place. The character of the litigation has, however, as suggested above, been general and balanced and not special or dominant in type. But (perhaps largely because of the solid type of its people) the cases are always earnest and substantial in the nature and number of questions presented, and such as expect and require painstaking consideration in disposition.

The opinions emanating from the Eighth Circuit have generally been regarded by the Bar and the bench of the country as carefully considered decisions. To the meriting and preserving of that reputation, Judge

Stone has contributed immeasurably during his tenure as Senior Circuit Judge. In presiding over a Division of the Court, he has undeviatingly adhered to the practice of requesting each sitting judge to prepare a conference memorandum, after a case is submitted, setting forth the particular judge's views on the issues presented, with his reasons and authorities therefor, and how he thinks the case should be decided.

Only after preparation of such memoranda by all the judges, discussion in conference of any varying views expressed, and agreement upon the judgment to be reached and its basis, has a case been assigned to an individual judge for the writing of an opinion. In this manner he has striven to insure that the work of the Court would be three-judge decisions and not one-man opinions.

An Admired and Beloved Personality

Perhaps the range of Judge Stone's service, in its number of years and its breadth of field, would alone have made him a distinguished judicial figure. But in the Eighth Circuit he is more than a distinguished judicial figure: He is to the bench, the Bar and the people of the area an admired and beloved judicial personality.

In judicial personality, tenure and experience are only secondary ingredients. Such a stature has in it beyond this the elements of family background, education, character, talents, dedication, habits and achievement, lighted by a harmony of true inner attunement and warmed by the radiance of genuine outer attitudes.

Judge Stone's Family and Educational Background

Judge Stone's family and educational background is notable. His family on his father's side planted its roots in American soil in 1632. One member was Governor of the Colony of Maryland under Lord Calvert in 1648. Another, Thomas Stone, was a signer of the Declaration of Independence and a member of the Committee of Five which drew up the Articles of Confederation. His mother also came of early stock and was a member of the Daughters of the American Revolution.

His father, William J. Stone, had begun the practice of law in Vernon County, Missouri (where Judge Stone was born in 1875); he later became one of Missouri's great political figures and statesmen. William J. Stone was during his public career a prosecuting attorney, Congressman, Governor of his State, and member of the United States Senate, where he is remembered as Chairman of the Senate Foreign Relations Committee during the administration of President Wilson. His standing among the members of the Senate was such that, when his son's name was submitted by the President for Circuit Judge, Republicans and Democrats alike joined in its confirmation from the floor of the Senate, without having the appointment referred to a subcommittee for hearing and report.

Attorney General Gregory later declared that he had made one of the most thorough investigations ever undertaken by his office, as to Judge Stone's qualifications, before recommending him to The President for appointment, in order to satisfy himself that there could be no possible criticism on merit from any of Senator Stone's political enemies in Missouri. There was none.

Judge Stone's Youth and Education

At the time his father was elected to Congress, Judge Stone was a mere boy. When his family went to Washington, he sold newspapers on the streets of that city. He later was made a page in the House of Representatives, but his father refused to allow him to receive any remuneration from the Government for his services.

Graduating from the Arts College of the University of his native State in 1895, at the age of 20, with a Litt. B. degree (his Alma Mater honored him in 1928 with an LL.D.), he was enrolled in the Harvard Law School from 1895 to 1898. Most of 1898 he spent in Europe, studying in Germany, principally at Hanover, and visiting in Switzerland and England.

That same year he became admitted to the Bar of Missouri. Thereafter until 1903 he spent most of his time in the law office which his father maintained in the city of St. Louis.

Early Practice of Law and Election to State Court

In 1903, he came to Kansas City, which he was convinced was a city of opportunity, and there he has since made his home. For two years, he practiced alone. At the end of that time, he associated himself with the office of the late Frank Hagerman, one of the outstanding lawyers of Kansas City, and for a period of seven years handled most of the trial work of the office. Thereafter, he was nominated and elected as a judge of the Circuit Court (Trial Court) of Jackson County, Missouri, and took office in 1913.

It was not then his intention to make the bench his career but to return to the practice after acquiring some of the experience and prestige which such a position affords in Missouri.

Appointed a Federal Circuit Judge at 41

While he was still on the State Court, he was appointed to his present position—not quite 42 years old at the time. His work as a State judge had been characterized by that same diligence, thoroughness and sense of responsibility that have distinguished his thirty-years service as federal judge.

From the time that Judge Stone became Senior Circuit Judge, the stamp of his personality upon the federal courts of the Circuit has continued to deepen. In the Circuit Court of Appeals, his qualities and attitudes have come to typify in the mind of the profession the spirit and atmosphere of that Court. His unfailing courtesy, applied attention, unruffled patience, and general considerateness toward counsel, are traditional in the Circuit.

Lawyers who have argued their

first case in the Circuit Court of Appeals, when he was presiding, have been heard to remark that in no court room have they ever felt more at home or has it been easier for them to do justice to their client's cause in argument. Any questions asked by him of counsel have been with a gentleness and kindness that have avoided throwing their thoughts into confusion. But, at the same time, no one with a disposition to impose or get off the path has ever failed to feel the inescapable rebuke of the calm, penetrating eye and the effective restraint of the quiet, determined force emanating from his chair.

An illustration of the attitude exercised toward lawyers who are sincerely trying to do their best comes to mind. A case was being argued in which counsel had used forty-five minutes of his allotted hour, without contributing much illumination. One of the judges sitting, who had been listening attentively and had attempted, without success, to clarify the situation with a number of questions, finally handed Judge Stone a note. "Do you understand", said the note, "what this case is supposed to be about?" "Not yet", was Judge Stone's patient reply, "but he still has fifteen minutes left in which to tell us."

His Supervision of the Business of the District Courts

In the District Courts, too, of the Circuit, he has made his friendly, helpful, but firm hand as Senior Circuit Judge felt. He has carefully watched the state of the docket of each District Court and the progress of its disposition during the Court year; and, where some undue congestion has developed, he has endeavored to ascertain its cause and to cooperate in meeting the problem in any manner necessary, such as by assigning another District Judge to help break the dam. He has kept alert to any trend of permanent increase in the volume of a district's business; and, where he was convinced that the situation soundly called for an addition of manpower, he has determinedly sought and obtained another judgeship, through a recommendation by the Conference of Senior Circuit Judges and the necessary legislation by the Congress.

Four additional District Judges have thus been added to the manpower of the Circuit while he has been Senior Circuit Judge, with three of them holding roving commissions, having been appointed to serve in each of two separate districts. In one instance the creation of another judgeship was opposed by the then Senior District Judge of a certain district; but Judge Stone was conscientiously convinced that the judgment of the District Judge was in error and that his responsibility as Senior Circuit Judge imposed upon him the obligation to urge the addition. The Conference of Senior Circuit Judges and the Congress followed Judge Stone's recommendation.

Efforts to Integrate Judicial Work and Spirit

He has striven, too, through conferences of all the judges of the Circuit, to integrate judicial spirit and interest and to encourage, so far as particular conditions and individuality do not make impractical, common methods and viewpoints in handling work. Long before the present statute was enacted to provide for an annual conference of the Circuit and District Judges in each Circuit, he had initiated the practice of holding such a Conference in the Eighth Circuit.

The first of these Conferences was held in Kansas City, Missouri, on January 3, 1930.

His Membership in Statutory Three-Judge Courts

He has kept up other immediate contacts with the District Courts, such as by sitting on a substantial number of the three-judge cases in these Courts that have arisen in the Circuit. Thus, he sat on the District Court in Missouri and wrote an opinion in the notorious litigation in that State, which compelled 139 fire insurance companies of the country to pay back into Court, for the benefit of policy-holders, the proceeds of a $10,000,000 fund, which had been impounded during litigation over rate increases, and of which the companies had obtained the release on the basis of a settlement approval by the Superintendent of Insurance, resting, however, upon a secret and corrupt deal with Tom Pendergast, political boss of Kansas City, and the Superintendent of Insurance. (See *American Ins. Co.* v. *Lucas*, D.C. W.D. Mo., 38 F. Supp. 896, *Id.* 926). He has continued to act in this case ever since, supervising the problems of effecting a proper distribution of the fund to the thousands of policy holders involved.

A few years after he went on the federal bench, he handled a receivership of the street-car system of Kansas City, and in a manner that won public commendation. The Company had been in receivership a number of times previously, and the community assumed that its affairs would undergo another political handling. It has not, since that receivership had to go through the Courts again.

His Work in the Conference of Senior Circuit Judges

His part in the efforts of the Conference of Senior Circuit Judges to improve the federal Court system has been similarly solid and substantial. He has been continuously one of the five members of the General Advisory Committee of the Conference. He was from the beginning one of the Committee that framed the Act creating the Administrative Office of the United States Courts. He has served on numerous Special Committees of the Conference.

The Conference has had a heavy agenda during the past few years; and no member can probably be said to have prepared himself more carefully on all of the subjects for consideration, or to have fortified himself any more clearly with the reasons for his position, than has Judge Stone.

But his interest and activity have extended also into local professional and judicial fields. Conscious of the need for common thinking by the

Bar and bench in achieving improvement in judicial administration, and of the responsibility resting upon the judiciary to avoid any severing of that thread, he has kept up his contacts with the lawyers of his State in their associational activities and has given them freely of his time and efforts. A concrete example will illustrate his continued interest in the Courts of his State. Some years ago, he advocated that Missouri make provision for a Conference of its State judges, after the pattern of the federal statute; and at the next session of the Missouri legislature, a bill was passed providing for the holding of such Conferences annually.

His Adherence to Sound, Middle-Ground Philosophy

In his judicial viewpoints, Judge Stone has been termed both a "liberal" and a "conservative". For a judge to be called both is perhaps evidence of a sound, resilient, middle-ground philosophy. The late William S. Kenyon, while a judge of the Court, once introduced Judge Stone to one of the close friends of of his senatorial days as "the most liberal member of the Court." Judge Kenyon, during his distinguished political career, was always regarded as an ardent "progressive", and he knew what a "liberal" was. But "liberalism" and "conservatism" are shifting terms, and the former today seems primarily to denote an extremity in end-running position. Under that momentary standard, Judge Stone would hardly qualify, but his brand as a liberal under the more enduring test of over-all views and record remains clear.

The philosophy of a judge is perhaps best seen in his dissenting opinions and in his off-the-bench expressions. Some indication of the tenor of Judge Stone's mind can be gained from his dissenting opinions in *United States* v. *Missouri Pac. Ry. Co.*, 244 F. 38, 46; *Homestead Co.* v. *Des Moines Electric Co.*, 248 F. 439, 446; *Kansas City Fibre Box Co.* v. *Connell*, 5 F. 2d 398, 405; *Cannon* v. *United States*, 66 F. 2d 13, 15; *Columbian Nat. Life Ins. Co.* v. *Foulke*, 89 F. 2d 261, 263; *L. Singer & Sons* v. *Union Pac. R. Co.*, 109 F. 2d 493, 497. These are merely illustrative, and there has been no attempt to make them selective.

His expression at the memorial in the Eighth Circuit for Mr. Justice Butler is illuminative of some of his general philosophy. He called attention to the fact that the Justice had at one time in his work on the Supreme Court been classified as a "liberal" and at another as a "conservative". In praising the high service which he felt that Justice Butler had rendered, he commented that "A swing too far to the left may be as fateful as one too far to the right", and that always in the work of the Courts the problem is "to prevent the beam from tipping too far out of true balance between the two opposed and vital components of democratic rule-governmental power and individual liberty".

The Volume of His Opinions and Dissenting Opinions

Reference has been made to six of Judge Stone's dissenting opinions. It should be added that, throughout his many years in the Court, in the 1800 cases in which he has sat, he has dissented from the majority opinion of the Court only fifty-one times. His separate or concurring opinions number only five. He has written the opinion for the Court in some 600 cases, extending from Volume 242 of the Federal Reporter through Volume 157 of the Federal 2d Series. The record indicates that one year he wrote thirty-eight majority opinions, one concurring opinion, and six dissenting opinions.

Shepard's Citator shows that in only twelve of the cases in which he wrote the opinion for the Court has the judgment been reversed by the Supreme Court. In sixteen cases, the judgment was affirmed on a review. In two others, it was modified. And in 125 others, petitions for certiorari were either denied or dismissed.

Characteristics of Judge Stone's Opinions

It is, of course, not possible within the limits of this sketch to review the range of the opinions which he has written or to make a demonstrative evaluation of their importance as judicial work. What he said on one occasion, in describing the work of one of his associates, after the latter's death, is also the best characterization that could possibly be made of his own standards and efforts: "Every opinion evinces close, careful and complete study and understanding of the record; painstaking and thorough examination of the authorities; careful application of the law to the facts and clear, forceful statement of the law and the facts". That kind of solid effort is of far more importance in the general administration of justice than an attempt primarily to create landmarks or legal literature.

His opinions have been models of simplicity and directness in their language, sentence structure, and statement of legal principles. No lawyer has ever had difficulty in understanding what an opinion held or why its position was reached. Every substantial contention raised has been carefully answered. A few opinions, picked at random, will sufficiently illustrate: *Hartford-Empire Co.* v. *Obear-Nester Glass Co.*, 71 F. 2d 539; *Cudahy Packing Co.* v. *National Labor Relations Board*, 102 F. 2d 745; *Emery Bird Thayer Dry Goods Co.* v. *Williams*, 107 F. 2d 965, vacating 98 F. 2d 166; *Goldie* v. *Cox*, 130 F. 2d 695; *Dunne* v. *United States*, 138 F. 2d 137; *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847; *St. Louis Southwestern Ry. Co.* v. *Henwood*, 157 F. 2d 337.

Warning as to a Labor Union's Defiance of Judicial Process

In the closing part of the opinion in the *Gluek Brewing Company* case (144 F. 2d at page 858), where an order of the National Labor Relations Board in a jurisdictional dispute between two unions was upheld (with a slight modification not here material), Judge Stone called attention to the possible desirability of an amendment or clarification of the National Labor Relations Act, to

insure that the orders of the Board and the Courts could not be thwarted in such a situation, through boycott and other economic pressure by the losing union, and said:

> Before closing this opinion, it is proper to comment upon statements in the brief of intervener Local No. 792. Such statements serve notice upon this Court—if, indeed, they do not amount to threats—that this intervener will disregard any decision of the Board and of this Court upholding the Board and will exercise what it calls its constitutional rights to render the order of the Board and the order of this Court ineffective. Such character of statement in a brief is as impertinent as it is frank. It has no place in the brief of any responsible counsel in this or any Court.
>
> However, the weight of this matter is not so much in the circumstance that the statements were improper. The gravity is in the situation that a labor union deems it has the uncontrollable power to disregard and to nullify a determination of the Labor Board and an order of a Court sustaining the Board. It may have such power or it may not. This is neither the time nor place to determine that. Such problem will become acute only if the threat ripens into action and something must be done in a contempt or other proceeding.
>
> If this power does not exist, the statute law should be made clear. If it does exist, there is even more necessity for remedying a situation where any person or body of persons in this country is above the law as declared by the Congress.
>
> The grave purpose of Congress in passing this Act was to provide the means for protecting the rights of labor to organize. The Act defines those rights and sets up the machinery to effectuate such protection. . . . The loser before the Board and the Court [of the two unions] says it will not abide by the result of the orderly determination in the manner required by Congress. It will destroy the innocent employer and put its organized employees upon the street. If nothing can be done, in an orderly way under existing law, to prevent this, then there is a vital defect in the powers of the Board or of the Courts because they are unable to effectuate the purpose of Congress [to promote industrial peace].

Opinion Upholding the Conviction of Communists

In the *Dunne* case, 138 F. 2d 137 (in which certiorari was denied by the Supreme Court), the opinion upheld the conviction of eighteen avowed Communists for a conspiracy to advocate the over-throw of the Government by force and to advocate insubordination in the armed forces. Commenting on the argument that the doctrines of the party were framed in a technical language, carrying "meaning only to the initiate", and that they ought not therefore to be permitted to be construed as the Government contended, Judge Stone said:

> In passing, one might wonder why obscure or doubtful or technical language is used. The English language does not lack for words to express clearly any thought which is intended to be widely understood, and party doctrines of importance are usually intended to be widely understood. However, language is sometimes purposely used to suggest or conceal meanings which, for some reason the utterer does not care to bring entirely into the open. . . . If a party or group—"radical" or otherwise—has no intention to overthrow or destroy the Government, nothing would be easier than to avoid doubtful language; . . . and this would seem to be peculiarly so where the party or group regards itself as "radical" and thinks many—even officials and juries—would grasp opportunities to weaken or destroy it. When such a group with such apprehensions consciously uses cloudy words concerning a matter of such vital importance in their doctrines and to the safety of themselves individually and to existence of their group, they do not use them accidentally, but for a very definite purpose. When they use words which may or may not mean the forbidden thing, they intend just one thing and that is to squirm through the statute leaving a haze which they hope will make it impossible or difficult to find any fracture by their passage. Courts should be careful in all things—particularly and equally where basic human liberties or where the life of the country is involved—but they do neither liberty nor their country a service by being so naive or simple as not to take into account human nature and existing situations known to every alert adult in the country.

Self-Effacing Devotion to Duty

Perhaps no more appropriate note can be struck in concluding this sketch than to relate an incident indicative of Judge Stone's concept of the self-effacing devotion to duty which should characterize a judge's work. A friend a short time ago commented upon Judge Stone's completion of thirty years of service on the bench and observed:

"But the Circuit Court of Appeals very rarely gets into the press or public eye, and most people probably hardly know that the Court exists."

"They may not know that the Court exists", was the smiling reply, "but I am sure that they would know if it did not—and that is what is of importance."

It should be added that, as in the case of any man who becomes a personality in his field, Judge Stone's home and family life have been an enriching complement to his work. His wife, the former Lucy May Cockrill, and their two daughters, like himself, have been born on the soil of his beloved State of Missouri. The rich devotion that has existed between Mrs. Stone and him, throughout their more than forty years of married life, has been to their many friends and the community an outstanding symbol of the eternal springtimeness of love. Neither one of them has or ever can grow old. Nor will his stature as a typical American judge and the appreciation of his forthright and devoted judicial work grow less.

International Law:

Disarmament and the Control of Atomic Energy

■ Before the House of Delegates on February 25, the Association's Committee for Peace and Law Through United Nations made a careful and comprehensive statement as to the American position respecting the creation of international and world law, along with suitable agencies for inspection and enforcement, for the control of atomic energy and other weapons of mass destruction. The Report considered also the relationship of the work of The United Nations Commission for conventional armaments and outlined the opposing views as to steps for progressive disarmament by the Nations. (33 A.B.A.J. 402; April, 1947)

Because the Committee's Report gave an integrated picture of the vital issues as they then stood (some progress has been made since then as to procedures but not as to substance), the *Journal* has received requests that it make available to the general membership of the Association the statement on which the House of Delegates based its unanimous action.[1] It is believed that this formulation will be useful to our members in explaining the issues and the Association's stand, in their home communities. The proposals go far in creating new principles and agencies of international and world law and in providing the means of "government of world affairs", through The United Nations. The substance of the Committee's Report follows.

■ The Committee's report pointed out that the central fact is that the first atomic bomb fell on Hiroshima after the San Francisco Conference had adjourned, in June of 1945. The drafting of the Charter was completed by men who did not have in mind the epoch-marking changes which the development of atomic energy and its use in war bring. The Charter contains many provisions which lend themselves to working through contingencies unforeseeable at the time of the Conference, but nothing designed to cope with problems as revolutionary, or as compelling and urgent in point of time, as were those brought by atomic energy and the bomb. There was agreement from the first, however, reaffirmed by the Delegate of the Soviet Union as recently as February 15, that the matter should be handled within the frame-work of the Charter.

When the organizational meeting of the General Assembly was convened in London in February of 1946, the need for action as to atomic energy was deemed to be so great that this matter of substance was taken up, without waiting for the sessions in America. The United Nations Atomic Energy Commission was created and given a mandate to develop and report practicable plans. The General Assembly is empowered by the Charter to create such agencies and prescribe powers and duties. Neither the Commission nor the Assembly itself has power to "legislate" or make recommendations effective. The Assembly may even empower such a Commission to develop plans and make recommendations which go beyond the powers given to The UNO by the Charter. But any recommended plan of such a commission can become effective only if embodied in a treaty or convention ratified by the Nations according to their respective constitutional processses.

In the opinion of the Committee, encouraging progress has seemed to be made by the Commission, at times[2]; but serious deadlocks have developed, some of which left doubt

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1. The Resolution adopted on this subject by the House of Delegates (33 A.B.A.J. 402; April, 1947) was as follows:

Resolved, That the American Bar Association declares its approval and support of the attitude and policy of the Government of the United States as to the earliest practicable control and utilization of atomic energy and as to a long-range program for progressive disarmament in respect of conventional armaments and forces, as such attitude and policy have been expressed in The United Nations Atomic Energy Commission and the Security Council of The United Nations, to the end

(1) That an Atomic Energy Treaty be negotiated, submitted to, and ratified by the member Nations according to their respective constitutional processes, which shall provide rules of international and world law to govern the control and utilization of atomic energy and shall vest The United Nations Atomic Energy Commission with adequate powers and plenary duties to control, supervise, regulate, and if need be to prohibit during determined periods, the manufacture and utilization of atomic energy and components of the utilization thereof, including, after the ratification of such a Treaty by all member Nations, full powers of visitation and inspection of plants and stockpiles used in connection with such manufacture, storage or utilization, with no right on the part of any Nation to veto or prevent such visitations and

whether an accord even as to objectives and good faith had been achieved.

Present issues stem from the Report of the Atomic Energy Commission to the Security Council on December 31, 1946. On the preceding day, the Commission adopted its Report (see 33 A.B.A.J. 140). The record states: "Ten members replied 'yes'. The U.S.S.R. and Poland abstained." This alignment has continued in the Council.

The Association's Committee Report points out that nearly a year after the action of the General Assembly, the Commission's submission was still a first and interim Report, on the most vital issue confronting mankind. It dealt mainly with scientific, technological, and managerial aspects of control. Except as negation of a "veto" on enforcement, it raised no political issues. It did not attempt to define the structure or power of the international control Authority (page 58). It contained no draft for the contemplated international treaty, which will take many months to draft. The Report reserved "many important questions to be further studied by the Commission" (page 16).

Except as to the requirement for unanimity of action, the Report proceeded on bases laid down by the Acheson-Lilienthal report to the American Department of State (reviewed in 32 A.B.A.J. 337; June, 1946) and by the Commission's own Scientific and Technical Committee (reviewed in 32 A.B.A.J. 761; November, 1946).

Effective Control of Atomic Energy Is Practicable Through The United Nations

Responding to the Resolution adopted by the General Assembly of The United Nations on January 24, 1946, the Atomic Energy Commission replies that "scientifically, technically and practically, it is feasible:

(a) To extend among all Nations the exchange of basic scientific information on atomic energy for peaceful ends;

(b) To control atomic energy to the extent necessary to insure its use only for peaceful purposes;

(c) To accomplish the elimination from National armaments of atomic weapons; and

(d) To provide effective safeguards by way of inspection and other means to protect complying states against the hazards of violation and evasions" (page 22).

The Commission's Report concludes that the world *can* have the benefits, and avoid the evils, resulting from the discovery of atomic energy *if* the Nation-states of the world are willing to bind themselves by a treaty creating an international Authority and giving it defined and limited powers, and if each of them thereafter conforms to the agreed-on restrictions and obeys the Authority. But the Commission says that "an international treaty or convention, if standing alone, would fail" (page 24).

The Commission's Report makes no mandatory recommendations as to international or national legal *ownership* of mines and processing plants, but it does insist that the treaty shall give international Authority *control and management*. "Control as used in this Report is a general term which includes any or all types of safeguards" (page 55). "Management means direct power and authority over day-by-day decisions governing the operations themselves as well as advisory responsibility for planning" (page 56).

Undoubtedly very serious questions for the future of the American economy and the private enterprise system are involved in the development and use of atomic energy for peacetime purposes. If atomic energy is to become the great new source of power for industrial and transportation uses, the internationalization of ownership, or even the nationalization of ownership, would put the Nation's economy and life at the mercy of the governmental owner. More than a few members of the Congress believed that implications of this character were inherent in the legislation creating the United States Atomic Energy Commission (although they voted for the bill); some have feared that collectivist concepts would be given free play in and through the international Authority or our own Commission. No such trend appears in the Report to the Security Council.[3] The question of the operation of mines and plants by the international Authority has emerged in the discussions, with the United States favoring and the collectivist U.S.S.R. opposed.

The Two Present Issues

The areas of agreement and disagreement may well be stated: Agreement was achieved on the principles stated

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inspection.

(2) That the United States shall not be required to give, and shall not give to other Nations, any of its information and skills as to atomic energy, unless and until such a Treaty has been drafted and ratified and a system of collective security against the use of atomic energy for warfare and mass destruction has been set up and made effective.

(3) That under such Treaty no violator of its provisions shall be able to defeat or avoid, by its own vote or by the vote of any other Nation, prompt detection and summary prevention and punishment of such violations.

(4) That the United States should cooperate in the development, through the Commission for Conventional Armaments, of a program for progressive disarmament by the Nations in respect of such armaments and forces; that the establishment of the means of collective security through the United Nations, in particular as to the control of atomic energy, should precede, not follow, any action by the United States to carry out such a program of disarmament; and that the establishment and effectiveness of a system of collective security against the atomic bomb should be agreed on first and separately, and should not be brought within the province or the inquiries of the Commission for Conventional Armaments.

2. President Truman's First Report to the Congress, on February 5, said:

The initiative in the control of atomic energy and other major weapons adaptable to mass destruction was taken by the United States. The resolution creating the Atomic Energy Commission was adopted at the first meeting of the General Assembly in London. The United States presented in the Atomic Energy Commission last June its proposals for international control of atomic energy. The Soviet Union opposed these proposals, but the commission worked throughout the summer and fall to build the bases for agreement.

In October the Soviet Union introduced in the General Assembly proposals on the general regulation and reduction of armaments that seemed at first far removed from the United States position. Nevertheless, seven weeks later the Assembly was able to adopt unanimously a resolution reaffirming all the principles of the atomic energy resolution and reflecting for the first time unanimous agreement on the essential principle of a system of international control and inspection established by treaty and not subject to any veto in its operations.

in the Resolution of the General Assembly on January 24, 1946, and on the creation of the Atomic Energy Commission to make studies and report. In the Commission, agreement was arrived at to place in the hands of the Commission virtually all aspects of control up to the point of enforcement against violators. Apparently, no Nation insists or proposes that it be given a "veto" power to prevent inspections, etc.[4] Most or many of the principles and methods of supervision, inspection, control, etc., to be embodied in the Treaty appear to be agreed on.

The Association's Committee advised the House that there appear to be two principal and basic points of disagreement between the United States and the Soviet Union. One of these has persisted from the first; the other has developed more recently and has had changing significance.

A. The Requirement of Unanimity of Action as to Enforcement Against Violators

The United States has maintained insistently, from the first, that no Nation which ratifies the Treaty should be left in a position to escape the consequences of its own transgressions and secure immunity for itself or any other violator of the Treaty requirements, against summary enforcement by The United Nations. If enforcement is left wholly to the Security Council, the "veto" provisions would apply to this matter of "substance", *unless* the Charter were amended so as to exclude "veto" of enforcement against a Treaty violator *or unless* the Nations so bound themselves in the Treaty as to forego that "veto" power.

The American stand for an agreement to suspend the veto as to enforcement against a Treaty violator has been beclouded by heated discussion and the inclusion of some extraneous considerations. The Committee found that the public mind seems to need wise and informing guidance by American lawyers. Fundamental and far-reaching principles are involved.

In some circles it has been urged that the "veto" issue is academic because in a showdown with a Nation secretly making atomic bombs, the other Nations will of necessity go to war at once or else seek appeasement, and that their course will depend upon the will of their peoples or their leaders and will not depend upon any absence of unanimity in action in the Security Council.

It is further said that the point is futile because the "veto" could halt action only by The UNO as such and that the Organization has as yet no military forces or power whatsoever.

Finally, it is said that since Russia will agree to everything except this one point, it would be sound statesmanship not to press it for the time being, in order that a great deal of the frame-work can be nailed down by a unanimous agreement.

These might seem to be "practical" arguments, but they can have no relevance to any plan whereby The UNO proposes to control atomic energy *by law*. A law is not just or unjust according to whether the police are strong or weak. The "statesmanship" argument must fail because a law that is left subject to a violator's "veto" of its enforcement against him would be a contradiction of terms. It would not be *law*.

The hope of the world lies in the progressive development of international law. As the conscience of mankind advances and world law develops, it cannot be stopped by a negative vote by any Nation. The decisions of the International Court of Justice are not subject to a requirement of unanimity. The Court's decisions are *law*.

It is currently said that there is an inconsistency in the American position. This may confuse the issue unless it is understood and faced frankly. At San Francisco, the United States was just as insistent as was Russia that the Charter provide for unanimity of action among the "Big Five" to prevent aggression. That is where the "veto", as a legal right, comes from. At Lake Success, the United States insists that, within the area of atomic control, no Power shall be able by its vote to block enforcement of the agreed-on Treaty.

The American position has been that the wise course is to support The United Nations staunchly and to help it develop step by step toward a juridical world order based on law and fair play. The dangers from the atomic bomb are believed to be so overwhelming that there is no choice except between life and death; and the chance for a survival of civilized living and peace of mind is through giving to an international Authority full powers to control and manage atomic energy, including the legal power of the Organization to proceed summarily against a violator, in the agreed-on respects and in this one field.

The Committee told the House that the Commission's Report submitted two proposals as to the "veto". The first was that

> No Government shall possess any right of veto over the fulfilment by the Authority of the obligations imposed upon it by the Treaty, nor shall

3. That the emphasis is on control and management is illustrated by the following provisions of the Report (page 21):

> The international control agency should control the storage and shipment of uranium and thorium materials to the degree necessary for security purposes.
>
> The international control agency should itself store and itself handle all enriched or pure nuclear fuel in transit. This does not necessarily imply ownership either of the materials or of the transit or storage facilities, questions which have not yet been discussed.

The preliminary nature of the Report is further illustrated in connection with seizure. That has always been a disturbing question. The international Authority may, in law, control and manage a uranium mine, but what happens if the Nation within which the mine is situated seizes the mine illegally *vi et armis*? The Commission's findings on this point are: "Problems relating to seizure have been considered thus far only in preliminary terms. The major questions of seizure are political rather than technical. It appears, however, that technical measures could reduce the military advantages and, therefore, the dangers of seizures" (page 22).

4. *Editor's Note:* The Soviet Union at first conceded the necessity for inspections, but favored National inspections. Lately, after the submission of the above Report, Mr. Gromyko apparently ceased to contest inspections by the international control agency, without "veto" by the Nation whose territory is entered. During the week of April 7, however, Russia opposed international "inspections" by airplanes to detect possible plans, and otherwise created doubt whether it had receded from its original opposition. On April 17, under questions from General McNaughton for Canada, Mr. Gromyko did not state whether, for example, non-Russian agents of the Authority would be permitted to visit the Soviet Union and inspect for clandestine violations.

> any Government have the power, through any exercise of any right of veto or otherwise, to obstruct the course of control or inspection. (page 26).

Apparently the Soviet Union accepts this principle as to control, except that it has demurred against authorizing UNO planes to fly over member countries to detect possible plants or illegal mines. The Soviet has not demanded a veto over any visitorial powers that may be granted by the Treaty. A treaty duly ratified with the consent of the American Senate is a law—for us, "the supreme law of the land". Because a treaty is a law, it cannot be left open to a unilateral "veto" by an incipient violator. Up to this point there seems to be agreement.

The second proposal was that

> Serious violations of the Treaty shall be reported immediately by the Authority to the Nations parties to the Treaty, to the General Assembly and to the Security Council. Once the violations constituting international crimes have been defined and the measures of enforcement and punishment therefor agreed to in the Treaty or convention, there shall be no legal right, by veto or otherwise, whereby a willful violator of the terms of the Treaty or convention shall be protected from the consequences of violation of its terms.

This has been the sticking point. The Soviet Union on February 15 stated its acceptance of the principle that a violation should be punished. But the Soviet Union maintains that the American proposal would change the whole basis, the agreements on which the Allied Nations came together to form The United Nations. As to the punishment of violators of the agreed-on *law* for the control of atomic energy, it does deal with an unforeseen situation in a new way. The San Francisco Conference had adjourned and the Charter had been signed, before the United States loosed its first atomic bombs. Under the Charter, Russia (or any of the "Big Five") can veto any enforcement measure on any subject when it comes to a vote in the Security Council.

But, as viewed by the Association's Committee, the only hope for controlling the atom bomb is through law. Let a plan, rooted in law, be set up legally, through a multipartite treaty duly ratified. Enforcement measures will then require action by the Security Council. That will be possible only if a power to "veto" cannot be exercised by a Nation which has ratified the Treaty. If we get that far, then we shall have set up a system of law. Any so-called law, such as a provision for punishing anyone who steals uranium, is not law if a violator can "veto" its enforcement. If we cannot have within The United Nations a system rooted in law rather than an individual Nation's decision based on its self-interest, we may best know this at the start.

The Committee advised the House that this may well be the most crucial decision which Americans shall have to face in our lifetimes. The Bar could not decide such an issue for the people, but it can help make the nature of the choice plain by making clear the nature and the essentials of world law on the subject.

In the present state of world opinion, the recommendations of The United Nations Atomic Energy Commission may fail if the Soviet Union so wills it. We shall then have to return to dependence on diplomacy, power politics, alliances, armaments. Some or all of these expedients may work for a time, but neither singly nor in combination can they establish the reign of law.

A treaty can be recommended by the Security Council and the General Assembly, to provide for the creation of an international Authority, define its duties and powers, prescribe punishments for violations, and explicitly abolish the "veto" power as to enforcement. If and when that treaty is ratified and adopted by sovereign Nations according to their respective constitutional processes, it will establish the reign of law over atomic energy.

As envisioned by the Committee, from that time on the law will be supreme. Any violator will be stripped of any possible legal pretext or defense. The violator, like the pirate, will be an international outlaw. Around the law as a nucleus the conscience of mankind can rally and grow strong. A law that appeals to the deepest emotions in men—their desire for justice and security—will not lack champions. The straight line drawn by law may be the decisive factor. We think that there can be no question as to the side of the line on which our country ought to take its stand.

B. The Relationship Between Summary Control of Atomic Energy and a Long-Range Program as to Conventional Armaments

At the autumn session of the General Assembly, the Soviet Union proposed a Resolution for general disarmament, to be implemented by the Security Council, with a Disarmament Commission (now identified as the Commission for Conventional Armaments) to work out a plan and details. Any such task would take a very long time and would involve the overcoming of many obstacles. Even the working out of a plan will take a long time. The United States does not and could not oppose a general scaling down of military strength in conventional armaments and forces. But the need for putting in effect, separately and as soon as possible, means of controlling atomic energy is most urgent.

The United States has taken the position that the Commission for Conventional Armaments and its work cannot be a delaying substitute for the Atomic Energy Commission and the Treaty. The United States insisted that the disarmament Resolution relate to conventional armaments and that the terms of reference in the disarmament Resolution exclude from its scope the matters delegated to the Atomic Energy Commission, and that overlapping would be prejudicial, even fatal.

The position of the Soviet Union appeared to be, essentially, that the Commission for Conventional Armaments should be given the "top" powers as to *all* materiel of warfare, including atomic energy and the

bomb. On February 11, the representative of the Soviet Union stated his position to be that matters in the province of the Atomic Energy Commission be not excluded from the authority of the Commission for Conventional Armaments, and that the latter be empowered to deal with atomic energy and to ask the Nations for information about their atomic bombs. American Delegate Austin adhered to the consistent American position and declined to accede to this at all. "We have gone to the end of the cable tow", this Vermont lawyer said, in the ski idiom of his State.

On February 14 to 18, the issue cleared somewhat in the Security Council. The disarmament Resolution was adopted[5], limited to conventional armaments. The Soviet Union abstained from voting; abstention is not a "veto"; the Soviet Union apparently conceded that the issue was not one of "substance" subject to the "veto" or that abstention from voting did not destroy unanimity. The recommendations of the Atomic Energy Commission as to the Treaty, etc., are being considered and appear to be moving ahead, with the Soviet Union proposing vital amendments, and with the Russian position unchanged that atomic bombs should be swiftly outlawed and destroyed, and that the "veto" as to enforcement should not be abridged.

Under the Soviet proposals of February 18, the International Control Commission would take over and own and operate, *as soon as the treaty is ratified,* all existing plants that process uranium and thorium ores into nuclear fuel, including the plants at Oak Ridge, Tennessee, Hanford, Washington, and in Canada. The Commission's plan, supported by the United States, proposed the use of one or more of several safeguards, such as inspection, supervision, accounting, licensing, even management, but no immediate transfer to international ownership, at least, until efficacious controls have been established. The two positions as to ownership and operation by the Commission seem lately to have become rather unclear.

The Issue Is Joined as to the American Policy

Except the Soviet Union and Poland, all Nations represented in the Security Council have voted to sustain the American position. The attitude and policy of our Government, with the strongest bi-partisan support, have been declared with the fullest consideration and made very clear.[6]

The Committee accordingly asked the House to declare the Association's support of the essentials of the American policy as expressed in the Resolution first above quoted. This was voted without a division or recorded votes in the negative.

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5. The text of the Security Council's Resolution on the general regulation and reduction of armaments and for information as to military forces of the United Nations, as adopted on February 13, declared:

The Security Council, having accepted the resolution of the General Assembly of 14 December, 1946, and recognizing that the general regulation and reduction of armaments and armed forces constitute a most important measure for strengthening international peace and security, and that the implementation of the resolution of the General Assembly on this subject is one of the most urgent and important tasks before the Security Council,

Resolves:

(1) To work out the practical measures for giving effect to the resolutions of the General Assembly on 14 December, 1946, concerning, on the one hand, the general regulation and reduction of armaments and armed forces and the establishment of international control to bring about the reduction of armaments and armed forces and, on the other hand, information concerning the armed forces of the United Nations.

(2) To consider as soon as possible the report submitted by the Atomic Energy Commission and to take suitable decisions in order to facilitate its work.

(3) To set up a Commission consisting of representatives of the members of the Security Council with instructions to prepare to submit to the Security Council within the space of not more than three months the proposals:

(A) For the general regulation and reduction of armaments and armed forces and

(B) For practical and effective safeguards in connection with the general regulation and reduction of armaments which the Commission may be in a position to formulate in order to ensure the implementation of the above-mentioned resolutions of the General Assembly of 14 December, 1946, in so far as these resolutions relate to armaments within the new Commission's jurisdiction.

The Commission shall submit a plan of work to the Council for approval.

Those matters which fall within the competence of the Atomic Energy Commission as determined by the General Assembly resolutions of 24 January, 1946, and 14 December, 1946, shall be excluded from the jurisdiction of the Commission hereby established.

The title of the Commission shall be the Commission for Conventional Armaments. . . .

6. Secretary of State Marshall said, on February 7:

"The statement which Senator Austin made in the Security Council on February 4 regarding the regulation of armaments represented, as he said, 'a well-settled, thoroughly considered opinion of the Government of the United States.'

"The goal we are all seeking is peace with a dependable basis for collective security. The United States Government will work with other nations to attain this goal as rapidly as possible. That is the first essential, I think, on the road to disarmament. It will not be a short road or an easy one.

"The international control of atomic energy with effective safeguards is of first importance. It is not a problem of disarmament in the conventional sense. Mankind can never feel secure so long as this great destructive force remains uncontrolled. That is why we are giving primary emphasis to solving the problems it presents.

"Also essential to the establishment of real security are solutions acceptable to the great powers of the tremendous issues which the peace settlement poses. It is difficult to see how any real disarmament, or even any substantial reduction of armaments, can take place until such solutions have been found.

"The United States Government, I am sure, will avoid with care a repetition of the tragic consequences of unilateral disarmaments and the limitation of armaments as was done in 1921. The problem cannot be solved on an emotional basis. This time it has to be on a practical basis."

Senator Vandenberg made on February 8 the following incisive statement as to disarmament and the atomic bomb:

"Under the auspices of the United Nations we hopefully approached the beginnings of world disarmament. Our own American position in behalf of peace with justice is clear. We shall not disarm alone. We shall trust no example. We shall not repeat our mistakes of twenty-five years ago.

"We shall take no 'sweetness and light' for granted behind the 'iron curtain' which still blacks out great sectors of the earth. We do not intend to be at anybody's mercy; nor do we intend to emasculate our authority with those who still think in terms of force. But we will joyfully match the utmost limits of disarmament to which other great powers will go, if there be summary disciplines which guarantee against bad faith.

"I repeat, however, that this cannot happen in ambush or on a one-way street.

"So, too, with atomic bombs. We monopolize the secret for yet a few more years. In the greatest exhibition of international good-will since time began, we are prepared to abandon this advantage, if, as and when all the world is prepared to outlaw the destructive use of atomic energy for keeps; if, as and when this renunciation is protected by totally and provable competent inspections and controls; if, as and when the world in general—and Soviet Russia in particular—agrees to swift and conclusive punishment which shall stop treachery at its source. This is our price; and the 'price' must be paid. We shall not trust alone to fickle words. Too many words, as at Yalta and at Potsdam and in Poland at this very hour, have been distorted of all pretense of integrity. We ask nothing for ourselves. We ask everything for peace."

12

House Committee on the Judiciary:

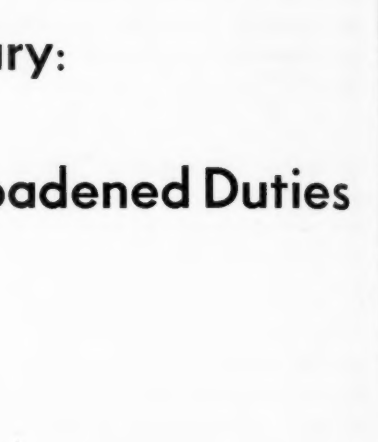
An Historic Committee and Its Broadened Duties

by **Edward J. Devitt** • Member of Congress

■ A Minnesota lawyer who has been a member of our Association since 1939 and has achieved the distinction of being named to the House Committee on the Judiciary in his first term in Congress, sketches the history of this important group of lawyers and states its enlarged powers and duties, as well as its current tasks, under the Legislative Reorganization Act of 1946 and the chairmanship of Congressman Earl Michener, of Michigan, who has been a member of our Association since 1922 (32 A.B.A.J. 890; December, 1946).

Representative Devitt (Rep.) practices law in St. Paul, Minnesota, and is a member of the Faculty of St. Paul College of Law. He has been admitted to practice before the Supreme Court of the United States, and to the Bars of Minnesota, Illinois, and North Dakota. He has served as Assistant Attorney General of Minnesota, and was for three years a municipal judge in St. Paul. He is a member of the Minnesota and Ramsey County Bar Associations, as well as of our Association.

Legislation with which our Association is concerned in behalf of the public and the profession, in relation to such subjects as the Administrative Procedure Act, the Administrative Practitioners' Act now pending, the Courts and the improvement of the administration of justice, as well as many others, are within the province of the hard-working and public-minded lawyers who constitute the House Committee on the Judiciary.



EDWARD J. DEVITT

■ One of the most important and hard working, but probably one of the least conspicuous, Committees of the United States House of Representatives is its Committee on the Judiciary. Its importance and influence have been enhanced as a result of the Congressional Reorganization Act of 1946.

The Judiciary Committee, since its establishment in 1813, has had such illustrious members as Franklin Pierce, Stephen A. Douglas, Thaddeus Stevens, and George W. Norris. Daniel Webster and James Buchanan were Chairmen of it. Webster headed it in the 18th and 19th Congresses, and Buchanan in the 21st Congress. Andrew J. Volstead, "father" of the Prohibition Amendment and prohibition laws, served as its Chairman in the 66th and 67th Congresses. Hatton W. Sumners of Texas, who recently retired from Congress, served as its illustrious chairman for the longest period—for sixteen years—and was a member of the Committee from the 65th through the 79th Congress.

The Committee now is headed by Earl C. Michener, the gray-haired, benign country lawyer from Adrian, Michigan, who has spent a total of twenty-four years on the Committee.

Committee Was Created in 1813

The House Committee on the Judiciary was created on motion of Congressman John G. Jackson of Virginia on June 3, 1813. Since that time it has held its way steadily as a favorite. The nature of the subjects with which it has been charged has

constantly drawn to it the best legal talent in a body so largely composed of lawyers as is the House. Of all the House Committees, that of the Judiciary is the most non-partisan in its character and operation. The work goes steadily on with little regard to party supremacy in the House. Its membership includes some of the best legal minds in the country, and it is not unusual for the entire membership of twenty-seven to be justly deserving of the title of "Judge", as a result of judiciary experience prior to their congressional service.

The Committee on the Judiciary has traditionally considered "charges" against judges of the United States Courts, legislative propositions relating to the service of the Department of Justice, bills relating to local Courts in the District of Columbia, Alaska, and the Territories, the establishment of a Court of Patent Appeals, relations of the Courts to labor and corporations, crimes, penalties, extradition, construction and management of National penitentiaries, matters relating to trusts and corporations, claims of States against the United States, general legislation relating to international and other claims, bills relating to the office of President, holidays and celebrations, bankruptcy, removal of political disabilities, prohibition of traffic in intoxicating liquors, mutiny and willful destruction of vessels, counterfeiting, settlement of State and Territorial boundary lines, meetings of Congress and attendance of Members and their acceptance of incompatible offices.

This Committee also has a general but not exclusive jurisdiction over joint resolutions proposing amendments to the Constitution. It also reports on important questions of law relating to subjects naturally within the jurisdiction of other Committees.[1]

Present Jurisdiction of the Committee

In the reorganization of the Congressional machinery in the summer of 1946, the powers and duties of the House Committee on the Judiciary were redefined so as to embrace all proposed legislation, messages, petitions, memorials, and other matters relating to the following nineteen subjects:[2]

1. Judiciary proceedings, civil and criminal, generally.
2. Constitutional amendments.
3. Federal Courts and judges.
4. Local Courts in the Territories and possessions.
5. Revision and codification of the statutes of the United States.
6. National penitentiaries.
7. Protection of trade and commerce against unlawful restraints and monopolies.
8. Holidays and celebrations.
9. Bankruptcy, mutiny, espionage, and counterfeiting.
10. State and Territorial boundary lines.
11. Meetings of Congress, attendance of Members, and their acceptance of incompatible offices.
12. Civil liberties.
13. Patents, copyrights, and trademarks.
14. Patent Office.
15. Immigration and naturalization.
16. Apportionment of Representatives.
17. Measures relating to claims against the United States.
18. Interstate compacts generally.
19. Presidential succession.

Historic Committees Merged Into It

Under the Reorganization Act, the present House Committee on the Judiciary constitutes a consolidation of the former Committees on Judiciary, Patents, Revision of the Law, Immigration and Naturalization, Claims, and War Claims. The Patents Committee was created in 1837 and had jurisdiction over matters relating to patents, copyrights, and trademarks. The Committee on the Revision of the Laws was established in 1868 and has been engaged in revising and codifying the United States statutes. The Committee on Immigration and Naturalization was established in 1893, that of Claims in 1794, and War Claims in 1883. The absorption of these five standing Committees by the Committee on the Judiciary correspondingly expands the latter's powers and duties.

In addition to the expansion of the work of the Judiciary Committee in the fields of patents, law revision, immigration and naturalization, the Legislative Reorganization Act of 1946 also brings within its purview two subjects not previously assigned to it specifically by the rules of the House; namely, apportionment of representatives and, in part, interstate compacts.

Jurisdiction Over Various Types of Claims

Moreover, under the revised rules of the House, the Committee on the Judiciary has jurisdiction over measures relating to tort claims against the United States which accrued before 1945, as well as over these twelve types of claims:[3]

1. Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise of performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.
2. Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
3. Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.
4. Any claim for which a remedy is provided by the Act of March 9, 1920 (U.S.C., title 46, sec. 741-752, inclusive), or the Act of March 3, 1925 (U.S.C., title 46, sec. 781-790, inclusive), relating to claims or suits in admiralty against the United States.
5. Any claim arising out of an act or omission of any employees of the

1. *Rules of the House of Representatives*, by Lewis Deschler, Parliamentarian; Washington, 1947, Sec. 707.
2. Public Law 601, 79th Congress, Sec. 121 (1) (1).
3. Public Law 601, 79th Congress, Sec. 421.

Government in administering the provisions of the Trading with the Enemy Act, as amended.

6. Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
7. Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.
8. Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
9. Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
10. Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
11. Any claim arising in a foreign country.
12. Any claim arising from the activities of the Tennessee Valley Authority.

Thus the jurisdiction of the Judiciary Committee covers many important fields of legislation, and its work-load promises to be much heavier than it has ever been before. So far in the 80th Congress, the Committee has drafted and proposed, and the House has passed, a Resolution proposing submission to the people of a constitutional amendment limiting the tenure of the presidency to two terms of four years each.

Among major problems on its current agenda are proposed amendments relating to the Presidential succession, bills to tighten the anti-trust provisions of the Clayton Act, portal-to-portal pay bills, various anti-monopoly measures, bills designed to protect the right to work, to regulate foreign agencies within the United States, to change the method of ratifying treaties, to abolish the Electoral College, to provide for several Vice Presidents, to establish a uniform system of bankruptcy, to amend the Nationality Act, to grant patent extensions to persons in the Armed Forces, to amend the Fair Labor Standards Act, to regulate immigration, to provide a Federal corrections system, to assure protection from mob violence and lynching, to extend admiralty jurisdiction, to amend the Employers' Liability Act, to suspend the deportation of aliens, and many others.

Thus it will be seen that in the one hundred thirty-seven years since its original establishment, the House Committee on the Judiciary has grown to assume a place of major importance in the legislative machinery of the country. Under the able direction of its present chairman, Congressman Michener, the Committee meets twice weekly, and its eight sub-committees meet almost daily, going about the, to some, prosaic job of amending and revising the laws and proposing fundamental changes to our Constitution. Considering the character of its work and the amount of time and attention demanded of it by the House, it may be said to be equaled by few and excelled by none of the other Committees in the House.

Sufficient Qualified Proof in Medico-Legal Controversy

■ In view of the increasing concern of members of the medical and legal professions because of the too-frequent lack of demonstrative and scientific proof on medico-legal issues in Courts and before administrative agencies, the American Medical Association's Section of Preventive and Industrial Medicine will conduct a symposium on this subject, at the Association's annual meeting in Atlantic City on June 11. As the situation has worsened particularly in the administration of workmen's compensation laws, where physicians often aid the claimant by testifying to alleged disabilities without sufficient factual knowledge or qualifications, the symposium will stress that phase of the over-all problems and try to develop a consensus as to remedial recommendations. Lawyers, physicians, toxicologists, and representatives of workmen's compensation boards in the United States and Canada will take part, with audience participation following.

13

World Repose Under Law: What Are the Fundamentals of Enduring Peace?

by **Guy W. Bange** • of the (Hanover) Pennsylvania Bar

■ Evidences multiply that many of our members in active general practice—men who have no professional relationships to international law and organization—have begun to concern themselves deeply with the problems of peace, world law, and the responsibility of the United States for moral leadership in behalf of just and lasting solutions. Lawyers throughout the country are reading, thinking, writing, and speaking, on these subjects as never before.

The following article by Guy W. Bange, of the Pennsylvania Bar, offers an earnest, and in some respects a new, approach to the problems of peace under law. He would supplement, not weaken or destroy, The United Nations and the World Court, but he seeks more immediate means of ensuring their efficacy for their great objectives. "If my article is published", he writes your Editor, "and proves to be provocative of thought and helps to crystallize a popular will for peace, I shall be profoundly gratified and grateful".

Mr. Bange was born in Hanover, York County, Pennsylvania, on Independence Day in 1880. After being graduated from Franklin and Marshall College in 1903, he was tutored in law privately and admitted to the Pennsylvania Bar in 1908. He has practised law ever since in Hanover, which has a population of 13,076. He has never held or sought public office, but has been a member of our Association since 1932. He is a member also of the Pennsylvania and York County Bar Associations. He is active in general practice, and holds the usual directorships in local banks and industries. Three members of his immediate family served in World War II, of whom two sons were in the Armed Forces overseas.

His proposals for world peace are specific—an integrated plan. He has difficulty with "the great dilemna" of "weighted representation", as everyone else does, because (Emery Reves to the contrary) the truly scientific data as well as the willingness of small Nations to yield individual representation are lacking (32 A.B.A.J. 759; November, 1946). The *Journal* is glad to be the means of bringing to its readers the obviously well-considered views of a lawyer who has been doing his own independent thinking as the means of overcoming the roadblocks on the way to peace.

■ That the common peoples the world over long intensely for peace is a reasonable assumption. Why, then, has their longing been frustrated, within the short space of a generation, by two cataclysmic wars in whose aftermath the annihilation of civilization itself inheres? Does not the answer lie in these considerations: That the will of the masses has lain dormant and ineffective in the councils of peace, and as a result the peacemakers, lacking the impulsion of a compelling popular mandate to do so, have failed to purge the world of the *causes of war?*

Is the widespread conviction that the house of The United Nations is built upon the shifting sands of power politics unwarranted? Until that house rests upon the firm foundation of world repose, is not its ability to weather the storms sure to come indeed doubtful? Do not world realities and their implications tend to justify the fear that unless there is undertaken a crusade to arrest the attention of the masses everywhere in a *people's peace,* a peace so obviously just as to engender a universal will for its realization, our faith in the efficacy of The United Nations to preserve peace will ultimately prove to be a delusion?

The possibility of attaining the goal of enduring peace by independent and unrelated steps (advocated by some as the only practicable method) does not seem to inhere in the realities of the political, economic, and social world of the foreseeable future, because those realities are so fundamentally divergent, so conflicting, so contingent one on the other with respect to their settlement, and so productive of suspicion, of fear, and of a sense of insecurity, everywhere, that their elimination as menaces to peace can be effected only pursuant to a plan which contemplates that result as an integrated whole.

That the world may be afforded an opportunity (say, during the next

GUY W. BANGE

ten to fifteen years) to work under the incentive and impulsion of a prescribed and orderly program in the gradual building of a foundation for *enduring peace under law,* should not the United States, the leading world power and the auspicious one to do so, invite all sovereign states to participate in a congress of world peace: (1) To explore the world situation with respect to the causes of war; (2) To agree in principle on what those causes are; and (3) To negotiate treaties to eliminate such of those causes as are believed not to be within the competence of The United Nations?

A Definitive Plan for Progress Toward Peace

Does the world order here envisaged become but a fanciful conception when it suggests the following as a program for its realization? Is it, as Robert Browning says,

> That far land we dream about,
> Where every man is his own architect?

A. (1) That the congress of world peace, whose functions shall be legislative in nature and whose acts shall be recommendatory only, shall be composed of an equal number of representatives of all states, including those enemy states with whom we have concluded treaties of peace; that each state shall vote as a unit, but in order that voting results may be as indicative of world opinion as possible, the vote of a state shall be equitably weighted by the congress on such democratic considerations as, say, war-making potentialities, finances, economies, exports and imports, population, and the like; (2) That the treaties so to be negotiated shall be grounded upon, but where in conflict with shall take precedence over, the forthcoming treaties with enemy states; (3) That the treaties shall be administered and enforced by The United Nations; (4) That the treaties shall provide for the perpetuation of the congress as a permanent body; (5) That none of the treaties shall come into force until all of them, as an integrated whole, are ratified by all the great Powers and by such number of other signatory states as may be designated; and (6) That any state may, pursuant to prescribed prior notice (say, two to five years), renounce at will the treaties as a whole.

B. The treaties should amend the Statute of the International Court of Justice to establish a criminal division of the Court, which, upon complaint of a state or of The United Nations, shall have jurisdiction over any person charged with having committed any act which is either defined in the treaties or recognized by international law as a crime against the peace of the world or against humanity. The judgment of the Court should be final, but a convicted defendant could appeal for mitigation of sentence to The United Nations. In time, experience will have developed a body of international criminal law which will be a powerful deterrent to those ambitious and unscrupulous persons who would fix their places in history as immortal state leaders through shedding the blood of the common man. The Nuremberg trials furnish a precedent, such as it is.

C. The treaties should provide that each state shall effect such constitutional or other measures as may be necessary to subject its nationals to the jurisdiction of the Court.

D. The treaties should amend the Charter of The United Nations and the Statute of the Court to provide that any judicable dispute which is a menace to peace and which the parties have failed to settle through pacific means shall, on motion of a disputant or at the direction of The United Nations, be submitted to the Court, whose decision shall be final and binding. At present, the Court's jurisdiction is voluntary. It should be made compulsory. Of course, jurisdiction in purely political disputes should remain in the Security Council and in the General Assembly, as it is at present.

E. The treaties should provide for progressive and ultimate total disarmament; provide that the manufacture, sale, and transport, of arms and armaments be controlled; provide that a state shall divulge, upon request, the extent and the nature of its military, naval, and air forces, and their movements and concentrations and the reasons therefor; and provide that no instrumentality of war of a state (except it be in distress) shall penetrate the territorial waters of, or the air over, another state, except with the prior consents of both such other state and The United Nations.

F. The treaties should outlaw the atomic bomb (preferably rockets, bacteriological and gas warfare, etc., also); direct the immediate destruction of all existing bombs; prohibit their manufacture; provide for international inspection and control; provide for periodical reports certifying the faithful observance of these provisions; and make the production, possession, or wilful concealment of the existence, of an atomic bomb a crime against humanity, with a provision that anyone found guilty thereof by the criminal division of the Court shall suffer severe penalties, even death. When these provisions become effective, the secret of atomic fission should be divulged.

G. The treaties should provide that the warships and commercial vessels of all Nations shall have access on equal terms, including customary tolls, to such waterways as the Panama Canal, the Kiel Canal, the Danube River, the Bosporus and Dardanelles Straits, the Suez Canal, and the Gibraltar Strait. Those waterways should be demilitarized, if not inter-

nationalized, when world disarmament of offensive weapons is substantially accomplished. In the meantime, their guns should be spiked as a token of compliance with the disarmament program.

H. The treaties should provide that enemy states shall be completely disarmed; that stable and recognizable governments shall be established therein in accord with such political procedures as the people may freely adopt; and that the armed forces of the Allies shall be withdrawn therefrom as speedily as circumstances warrant. Thus, enemy states will be afforded an opportunity to rehabilitate themselves and to become respected members of the family of Nations.

I. The treaties should guarantee the right of self-determination by plebiscite or by other pacific means to all semi-sovereign and dependent peoples, and the exercise of that right when, in the opinion of The United Nations, a subject is capable of taking its place in the community of sovereign states.

J. The treaties should prohibit the acquisition of territory by a state by cession, purchase, lease, or otherwise, unless such acquisition be approved by The United Nations.

K. The treaties should prohibit peacetime loans by a state or its nationals to another state (which, in the event of default, are not conducive to good international relations), and provide that such loans shall be made exclusively by an instrumentality of The United Nations.

L. The treaties should provide that all states shall submit to inspection by, and shall report to, The United Nations on all matters within its competence.

M. The treaties should prohibit peacetime censorship of news, and should establish a bureau of public information, whose investigators, competent and disinterested and enjoying the privileges and immunities necessary for the performance of their duties, shall make factual and authoritative reports on events of international concern. To this bureau the world could look for fact and truth as the molders of public opinion and thus counteract the propagandistic poisons which pollute the channels of world news.

N. The treaties should amend the Charter of The United Nations to abrogate the right of veto in the Security Council. Fear arising out of the instability of international relations is the root of the veto, and the present insistence of the great Powers on its retention is understandable. Eliminate the causes of war, and justification of the veto will vanish. In due time, should not the Security Council be abolished altogether, leaving the democratic General Assembly as the principal enforcement organ of The United Nations?

The armed forces made available by its Charter to The United Nations will serve as an international police force to give effect to its decisions.

The right of a state to renounce the treaties at will, as hereinbefore provided, is suggested on the assumption that no state would be willing to delegate irrevocably, even in the interests of peace, any important attribute of its sovereignty for a stipulated short or long, much less an indefinite, period. The writer believes that that reserved right—which, on first thought, might be held to be a fundamental weakness—would prove through experience to be a strength, for it would not only be an inducement to enter into the treaties, but it would also serve as a sharp and constant warning that unless all states work in the spirit of the Golden Rule to maintain the peace, the peace will be jeopardized, possibly disrupted altogether, through summary renouncements of the treaties by disgruntled states. In time, might not that right prove to be the catalytic agent necessary to the formation of a permanent Union?

For Means of Governing World Affairs

To summarize: The congress of world peace would be a permanent body, independent, but in aid, of The United Nations; its function, legislative in nature, would be the negotiation of treaties to eliminate causes of war and to develop a body of international law, including criminal law; its acts would be recommendatory only; the treaties negotiated by it, when ratified by the requisite number of states, would be administered and enforced by The United Nations.

Thus, in the congress, the world would have a legislative body; in the International Court of Justice, a judicial body; and in The United Nations, an executive body.

A Confused World Awaits Leadership of Vision

The experience of centuries has proven that imperialism, expansionism, spheres of influence, power politics, nationalism, huge armaments, the machinations of the diplomatic game, and the like—all hangovers from the ages past—are insidious breeders of war and are the inevitable results of a lack of world cooperation. Tragic it is in this age of supposed civilization that man's supreme aspiration—peace—remains unrealized. A deluded and confused world is ripe for a new order; and if leadership of vision can make his will respected, the common man, the innocent and real victim of this bankrupt scheme of things, will not neglect again to heed the ominous lessons of history.

That leadership rests with the United States, for its place in world affairs is preeminent, and its voice will be commanding. If the United States should boldly advocate a genuine people's peace with an ardor comparable to that which it evidenced in the prosecution of the war, its proposals would capture the imagination of mankind.

Unless the peacemakers realize that peace can endure only with the sanction of humanity and through a sympathetic understanding of the legitimate aspirations of all peoples, there will be no enduring peace. If the peace of the future is to be a peace of force instead of a peace of repose, let us not gamble in the future of this Nation, but exhort our countrymen to put aside their idealism and to prepare mightily to save America.

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■ *The Twenty-Second Chair*

American lawyers will support with their earnest wishes the hope expressed by Senator Arthur D. Vandenberg, of Michigan, Chairman of the Senate Committee on Foreign Relations, at the exercises commemorating the fifty-seventh anniversary of the Pan American Union of the twenty-one American republics, that the long-vacant twenty-second chair at the Union's imposing Council table will soon be occupied by Canada, so that "our continental fellowship will be geographically and spiritually complete from the Arctic Circle to Cape Horn".

"Consultation," he said, "is the keynote of the Americas. Consultation, not dictation, is the indispensable means to this end. Partnership is the genius of this relationship. Consultation is its lifeblood . . . We must not drift apart. Too much is at stake in this restless and uncertain world. We cannot consult and confer too often in the conservation of our heritage."

Such an invitation could come only from the governing board of the Pan American Union. When its building was erected, thirty-seven years ago, a chair was provided for Canada, and its coat-of-arms adorns the edifice, along with those of "the other countries which make common cause for peace and progress in this hemisphere".

Canada and the Americas cooperated closely during the war. Canada and the United States are working together closely to provide defense for themselves and the Americas in the event of an attack. The Canadian and American Bar Associations have joined in effective efforts in behalf of the World Court and international law. The Canadian Bar Association has joined the Inter-American Bar Association. We hope that Senator Vandenberg knew whereof he spoke, when he asked that the further step be taken for complete unity in the Americas. Canadian Under Secretary of State for External Affairs, Lester Pearson, was asked on March 10 as to why Canada had not joined the Union. "The short answer," he said, "is that we have never been asked."

It now seems strange, almost beyond believing, that the United States was long the leader of opposition to inviting Canada into the Pan American Union. This was on the principle that no country should be admitted to membership whose foreign affairs were to any extent decided in a government outside this hemisphere. Although Canada is a valiant member of the British Commonwealth of Nations, she has long been, as Lester Pearson said in March, "a free and democratic Nation, within the British Commonwealth of free Nations, but ready and able to cooperate with other American Nations".

The fifty-seven years of useful functioning of the Pan American Union is perhaps the most striking demonstration in the world today that The United Nations can be made to work if the spirit of understanding, cooperation and accord exists, and can be strengthened from time to time as new needs arise. No Nation has found that the Union menaced its security, its "sovereignty", or its long-run interests. A vital step forward will be to complete and solidify at this time, as Senator Vandenberg has eloquently urged, the unity for peace and law "from the Arctic Circle to Cape Horn". The lawyers of the Americas have led the way.

■ *The Best Should Be Willing*

Already our Association's Committee on the Judiciary has run into a difficulty which was perhaps to be expected, with the present level of prices, the present tuition fees and other costs of education, the present rates of pay for domestic servants, and all the factors entering into the high and uncertain cost of living for members of professions, in an economy thrown out of balance by wage increases, governmental price maintenance, and large scale governmental buying of commodities. Lawyers who are splendidly qualified by experience and temperament for service on the bench, lawyers whom the Bar would have been happy to see elevated to federal judgeships, have felt obliged to decline to permit their names to be submitted for consideration as to appointments.

Whether such a lawyer should refuse to let his name be considered for a federal judicial office is a decision which he has to make, according to his own conscience, the needs of his family, and the state of his own resources. There can be no higher privilege or greater duty than to become a minister of impartial justice. Strong soul and high endeavor, a passion for law-governed justice and a tested capacity for administering it without subservience to any party or philosophy—our country and our profession need them now as never

before. Is this worth some readjustment and sacrifice, by individual lawyers? This may mean *you*.

To help give to our country a federal judicial system made up of experienced lawyers possessing great independence and courage, is a service to which members of the Bar may be called, and should even be subject to draft. The best way to prevent and defeat a partisan and poor nomination is to make it clear that lawyers of excellent qualifications and known fitness are willing to take the post.

Wherever it is in any way possible, lawyers who are importuned to permit the use of their names for appointments to federal judgeships should not decline or hold back. It should be regarded as a signal honor to yield to such a request from the organized Bar, and no opprobrium attached to such a consent under circumstances where a less qualified person is nevertheless nominated. "Set ye up a standard in the land", for filling judicial vacancies with qualified lawyers. This can be done only if the fit are willing.

■ *Enforcing Peace Against Small Nations*

A disappointing philosophy as to the function and future of The United Nations Organization underlies the decision of its Military Staff Committee that the "international police force" put at its disposal shall be sufficient to deal with acts of aggression or war by small or middle-sized Nations but shall not be large enough to take action against aggression by any of the five Principal Powers—the United States, Russia, Great Britain, France and China.

Thus it appears that progress has not yet been made beyond the concept, developed at Yalta and acquiesced in at San Francisco, that peace among the five Principal Powers will be maintained, if at all, through their cooperation and agreement and that any one of them can block military measures against itself by withholding unanimity of action. This is contrary to the views expressed by some Nations during the discussions of disarmament, to the effect that the creation of an adequate international police force, through agreements to place quotas of armed forces at the disposal of The United Nations Organization, should precede any progressive disarmament by the Principal Powers. The decision is repugnant also to the principle of the equality of the Nations, large and small, in that the small and middle Nations will be subjected to the use of collective force if they breach the peace, whereas any of "the Big Five" will keep the peace only if it wishes to do so and will not be subjected to preventive and punitive action by any forces mobilized by The United Nations.

That "little wars" will be suppressed by force if need be and that armed forces will be made available to The United Nations Organization for that purpose may be a step forward, a decision within the bounds of the practicalities. But the recommendation of the Military Staff Committee, if it is finally sustained, may come as a shock to idealistic thinkers who had fancied that the creation and staffing of The United Nations had ended the possibility of wars of aggression by any Nation.

The stark fact remains that under the present Charter, there is and can be no capacity of The United Nations Organization to bring armed forces to bear against any Nation which is strong enough to start a large-scale war of aggression. As to such a contingency, the peace-loving countries are left in virtually the same position as they were before San Francisco: If a Big Power refuses to yield to peaceful suasions and starts a war, the other Nations will have to make their decisions and take their action outside the frame-work of the Charter. The right of self-defense is unimpaired; the illegal nature of armed aggression is not

palliated; the duty of collective action against an aggressor is unchanged.

Meanwhile, the struggle for universal acceptance of the rule of law and for strengthening the international organization to a point where it cannot be shackled by an offender or barred by it from summary action, will engage the best efforts of men of good-will in all lands.

■ *Mutual Respect Between the Branches of Government*

With many momentous events taking place in our country and the world and the newspapers giving space to them as never before, a less conspicuous issue has received earnest consideration in the Congress, for the reason that it involves deep-rooted questions as to the team-work of the three coordinate branches of our federal republic and confirms the complex difficulties which arise when one branch of Government fails to show a decent respect for the considered determinations of another branch. The controversy also high-lights the unsolved problems of adjustment between The President and the Congress, of which Walter P. Armstrong writes elsewhere in this issue.

The problem now before the Congress arose when the present minority party was in control of both houses. Neither then nor recently has the division been on partisan lines. The genesis of the controversy was in 1943, when the House Committee on Appropriations recommended, and the 78th Congress voted, that no federal funds should be paid as salaries, after November 15 of that year, to Robert Morss Lovett, then Government Secretary of the Virgin Islands, or to William E. Dodd, Jr., or Goodwin B. Watson, then employees of the Federal Communications Commission. The bi-partisan decision and vote against paying salaries to them were based on the unanimous report of an investigating sub-committee that these employees were "subversive" in their views and activities *(Congressional Record, 78th Congress;* May, 1943; pages 4480-4484). For example, it was reported, as to Dodd, that

> Upon consideration of all the evidence your Committee finds the membership and association of Dr. William E. Dodd, Jr., with the organizations mentioned, and his expressed views and philosophies of government constitutes subversive activity within the definition adopted by the Committee, and that he is, therefore, unfit for the present to continue in Government employment.

The three employees were nevertheless, in disregard of the specific provision of Paragraph 304 of the 1943 Urgent Deficiency Appropriation Act signed by The President, kept on the payrolls sufficiently after November 15 to create a claim for their compensation. Then they went to the Court of Claims, which decided in their favor. The Congress, through its own special counsel, appealed to the Supreme Court. In June of 1946 the latter unanimously upheld the award in the Court of Claims, and condemned Paragraph 304 of the proscribing Act as amounting to a "bill of attainder" within the meaning of the Constitution, in that it was "a legislative act which inflicts punishment without a judicial trial." The Court said:

> What is involved here is a Congressional proscription of Lovett, Watson and Dodd, prohibiting their ever holding a Government job. Were this case to be not justiciable Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any Court.

Against the background of the present efforts of The President and the Congress to eliminate from federal offices all persons of Communist or "subversive" views and affiliations, more than a few members of the Congress have taken a stand against paying the judgment awarded by the Court of Claims and upheld by the highest Court. Under the leadership of lawyers like Congressman Hobbs, of Alabama, and others in both parties, who have no sympathy whatever with Messrs. Dodd, Lovett, and Watson, and have done all they could to eliminate them and their ilk from the federal payrolls, the Congress seems to be on its way to paying the awards as fairly required by the outcome in the Courts.

While holding no brief for the point of view which created and forced such an issue by retaining these employees on the payrolls in the face of the evidence marshalled and the conclusions stated in the Congress, we think that a further withholding of payment would be inconsistent with due respect for the coordinate structure of our Government and for the federal judiciary as the branch charged with determining finally the questions of law on which may depend a dispute as to the financial obligations of the Government. As our Courts can interpret the law but not enforce it, a mutual regard and respect are essential at all times, on the part of the three branches of the Government; and the body which holds the purse-strings cannot consistently repudiate and dishonor liabilities declared by the Courts of the republic.

■ *"Final" for "Peremptory"?*

From Justice Frank Oliver, formerly a Member of Congress, now presiding in the Court of Special Sessions in New York City, comes a resounding blow or "blast" against the use of long words in recording the action of Courts.

The casher of a bad check was awaiting trial. There had been shilly-shallying for delay. Counsel for the accused wanted two weeks more. The assistant district attorney was willing, if that would be the last postponement. So the conventional request was made to the Court, "with the understanding that the case be marked peremptorily against the defendant."

This did not suit the ear of Justice Oliver. " 'Final'

is a good word", said he—a better one, he thought. Many people could not pronounce "peremptorily", much less spell it. " 'Final' is final." It still may not be "peremptory", but the "final" adjournment should end the delay of trial.

■ *"Practical Construction" Strengthens the Charter*

With the General Assembly of The United Nations unexpectedly re-convened on the Flushing Meadows on April 28 for a special but limited session as to the Palestine issues, lawyers from the member countries have been alert in discerning changes in psychology, practice, and "common law", that have been developing in the Organization since the General Assembly adjourned last December.

One of the manifest trends has been a practical construction of the Charter, as to voting in the Security Council, that lessens the divisiveness of the "veto" without amending the Charter but does so in a seeming disregard of a specific provision. Article 27, in setting forth the requirements for unanimity of vote among the five Nations having permanent representation in the Council, says that "Decisions of the Security Council . . . shall be made by an affirmative vote of seven members including the concurring votes of the permanent members." The letter of the Charter thus stipulates that if the Council is to make a decision, it must be supported by the affirmative votes of the five permanent members—the United States, Russia, Britain, France and China.

What was the representative of one of the "Big Five" to do, if his country could not vote affirmatively for a measure before the Security Council but did not wish to defeat and bar the majority view by a negative vote? There was no provision for abstaining from voting; "affirmative" votes were required for action. Of course, any Principal Power who wished to disrupt and paralyze action by the Council would need only to vote in the negative on all proposals which were not to its liking.

The first clear step toward the extra-legal device which seems to have become common usage was taken by Mr. Gromyko, of Russia, on April 29, 1946, when he refused to support a proposal to create a five-nation sub-committee to investigate the evidence against the Franco regime in Spain. His abstention from voting was accompanied by a careful explanation which pointed out that he was not using a "veto". On December 19, on one aspect of the Balkan Investigation Commission, Mr. Gromyko again refrained from voting, and Sir Alexander Cadogan took the same course on the same day.

Thus far in 1947, the abstention without "veto" has become almost a part of the common law. On the most recent of some ten uses of it, the non-voting member has not felt called on to offer an explanation. Late in March, during the Council's consideration of the request by the United States for trusteeship over the former Japanese-mandated islands, Warren R. Austin, the American Delegate, abstained from voting on some of the amendments. On April 9, the practice was emphasized when Russia did not vote for or against sending the British-Albanian dispute to the World Court, but did not urge its abstention as violating the rule for unanimity of action.

Article 27 of the Charter stands unchanged. The rule of reason and men's willingness to defer to majority views even if they cannot support them make headway. Whether the Charter will be amended later to embody the new usage in a specific modification of the unanimity and "affirmative vote" provisions, is still unclear.

■ *"—Work Hard, Live Well and Die Poor"*

Why is that true of us?

We work hard, in large measure, because the only wares that we have to sell are our own services. Not for us the bright idea that sets going a business machine to grind out an income. Not for us the skill that selects the members of an organization to perform for our benefit the tasks of which we are not capable. Then too we work hard to gain the respect of our fellows.

There are attractive figures at the Bar who pose as unprepared and would have us think that some brilliant device pulled out of a hat at a conference was the inspiration of the moment. They do not fool us. When you, Mr. Country Practitioner, are associated in a case with you, Mr. City Practitioner, and each of you, after wondering how you are going to get on in the unaccustomed climate, finds that every difference is swallowed up in respect for your associate's ability, that is the result of hard work, something that lawyers understand equally clearly on Wall Street and on Main Street.

Perhaps, though, we are too modest in thinking that we work hard only because we have to or because by it we gain the respect of our brethren at the Bar. It may be that there is enough of the divine in our clay so that, as our calling is high, so are our efforts. He must indeed be base who does not give all that is in him when a fellow creature chooses him as a bulwark against injustice.

We live well because we are a part of life. The active practice of our profession breeds no misers or ascetics. It is not a mere accident of history that barristers enter the English Bar by way of dinners eaten at the Inns of Court. Our eating and drinking as friends is not in spite of, but because of, our striving mightily. What man could come home from the courtroom where he has been the dominating figure throughout the day and

then take his wife and daughter to anything less than the best the town affords? What group of lawyers riding the circuit with the judge could bother with anything but the best in food or drink or lodging at the county seat hotel? Vanity may have much to do with it, but who could keep from being vain whose profession makes him take the center of the stage in every scene? Could a man who has lived life to its fullest in those sweet moments when he has done his best and the jury is out, stop living when the jury comes back and raises him to the skies or plunges him to such depths that he needs all his manhood to bring him back? What do laymen have in their lives to take its place? When Charles James Fox said that the greatest pleasure in life was to gamble and win and the next greatest to gamble and lose, he must have been referring to the lawyer's place in litigation. The appetite for life grows by what it feeds on and we turn naturally from the rich life of our profession to the good things of life about us.

We die poor because there has always been in our lives something more important than saving or even making money. Perhaps living well has something to do with dying poor but it is only a contributing cause. If a lawyer is working through lunch hour on the speech he is going to give the jury on behalf of his client in a breaking-and-entering case when court opens again in the afternoon, and another client, President Montmorency of the Pomposa Oil Company, telephones him to buy himself some of the preferred stock before the market closes because the accumulated dividends are going to be declared that afternoon, it does not occur to him to take the time to act on the tip. The lawyer's mind is simply incapable of balancing the few thousands he might pick up against his obligation to his fellow man in the toils of the law from whom he will earn the fifty dollars which he has prudently obtained in advance. There are probably members of the Bar who think of money first and their client's rights second, but they are not lawyers. Lawyers die poor and their sons say "Well, his was a good life," and start out, without patrimony, to live it over again.

■ *What Seniority and Continuing Rights for Veterans?*

Another instance has arisen in which it may be appropriate for the Congress to re-examine the interpretation and practical operation of a statute, as declared by the Supreme Court, to be sure that the judicial interpretation effectuates, and does not defeat, the legislative intent. The question arises as to Section 8 of the Selective Training and Service Act, which the Congress continued in force indefinitely. The majority decision on April 14, in *Trailmobile Company* v. *Whirls*, concerned the duration of the veteran's restored statutory seniority standing, after he comes back to work. The Congress directed that he should be given his job back and could not be discharged without cause for a year. The Congress was explicit also in requiring that he be given seniority standing and "other rights", under Section 8 (c) of the Act. Did the Congress intend that his earned seniority and "other rights" could be taken away, after a year, even though he was kept on in his job? Did the Congress intend that after a year his statutory seniority and "other rights" were subordinate to collective bargaining contracts and the demands of a majority union?

Whirls had worked for a wholly-owned subsidiary of Trailmobile for seven years before he entered the Armed Forces in 1942. When he was honorably discharged, he came back to work and was given seniority status according to law. Employees of both companies were represented by an AF of L union. Merger of the companies was followed by strife between the AF of L and the CIO; the latter won an election and was certified by the NLRB. The "closed shop" contract with the CIO fixed the seniority status of a minority of the employees (those from the smaller concern) as dating from January 1, 1944, irrespective of the date of their original employment.

Whirls joined the CIO, to comply with the "closed shop" requirement. When his seniority was reduced despite intervention by Selective Service officials, he brought the federal suit, to test whether the Act protected the seven years of earned seniority which had been taken away. For going to Court he was expelled by the Union, which then demanded that the employer discharge him for his lack of membership in good standing. The employer complied, but gave him a leave of absence with pay.

Thus Whirls had lost both his seniority standing and his job. The District Court and the Circuit Court of Appeals held for him, on the ground that his statutory seniority and other status did not end with the expiration of a year. In a limited holding, after elaborate analysis of the wording of Section 8(c) of the Act, the majority in the Supreme Court reversed the Courts below. The majority found it "unnecessary to pass upon" the question whether "all protection afforded by virtue of Section 8(c) terminates with the ending of the specified year."

Said Mr. Justice Rutledge for the majority: "We hold only that so much of it ends then as would give the reemployed veteran a preferred standing over employees not veterans having identical seniority rights as of the time of his restoration. We expressly reserve decision upon whether the statutory security extends beyond the one-year period to secure the reemployed veteran against impairment in any respect of equality with such a fellow worker."

The Government contended strongly against the view taken by the majority, who referred to "the Govern-

ment's strained and unconvincing citation of the Act's legislative history." Mr. Justice Jackson filed a vigorous dissent, in which Mr. Justice Frankfurter concurred. They commented severely on the union maneuvers, in the guise of bargaining. "The short of it is," said Mr. Justice Jackson, "that Whirls is out of seniority, out of work, and out of the union with all that this means in a closed shop industry," and that "His predicament comes about not because of any fault of Whirls as a workman, nor because of his employer's wish." If seniority dating back to original employment in 1935 could be cut down so as to date only from January 1, 1944, the protection of a veteran's seniority for a year after his return was looked on as illusory.

The majority and minority have stated clearly their opposing concepts as to what the Congress said and meant. It should be easy for members of the Congress to read the two opinions, weigh their practical consequences, and decide whether the majority view is consistent with the measure of justice and fair play which the Congress sought to assure to re-employed veterans, against the machinations of labor organizations which grew strong while the veterans were away.

Editorials

From Members of Our ADVISORY BOARD

■ *News That Does Not Get Space*

Is our Association at fault, or are the newspapers to blame, or both, that the meetings and activities of our Association get so little attention and space in the daily press? Surely our Association has not overlooked the fact that this is an age of *publicity*—organizations and institutions grow in influence and prestige according to what is *published* as to what they do and are trying to do.

How many lawyers in the country, except those who attend our meetings, know promptly the debates and the decisions voted in the House of Delegates and the outstanding work of the organized Bar? To what extent are the constructive accomplishments, the important public objectives and hard work, of our Association made known to the general public? Neither the press in the cities where our meetings are held, nor our local papers throughout the country, carry more than the most meager reports of our deliberations and decisions.

There must be some answer, some way of overcoming the fact that our meetings and activities are not treated as *news*. It is true that our Resolutions do not usually denounce or condemn anybody; they are constructive and remedial, not sensational; they have to compete with all sorts of international and domestic news, much of it produced by leaders who have a genius for "making the head-lines".

I know that our Association has lately been trying hard to overcome this lack, and my purpose here is not to criticize. Our new Committee on Public Relations may be able to overcome the difficulties. But we had better all be thinking and working to see how each of us can help get the Association's story across to all members and to thinking people generally.

Association news and work are told very well in the JOURNAL, once a month. How many of our members read each issue through? How many people who are not members read the JOURNAL? A large proportion of the Senators and Congressmen are lawyers; many are members of our Association. Do they see and read the JOURNAL regularly? I doubt if many of them do except when some special article is brought to their attention by a letter from some one they know.

I have heard of legislators, judges, editors, educators, who have been impressed and influenced, when some lawyer placed a copy of the JOURNAL in their hands and asked them to read a particular article. Some members of the Association do that with their JOURNAL, and even get extra copies for the purpose. Excellent local editorials or official action have resulted. Why shouldn't the JOURNAL make a special low rate for three or five extra copies of each issue, for members who are willing to help in that way?

The fact that troubles me is other National organizations seem to be getting much better results in public information. Physicians, engineers, labor leaders, even morticians, get a better press. Yet the great body of lawyers who are not able to attend our National meetings, and a very large part of the public, are frequently glad and express their great appreciation whenever they are given an opportunity to read of what our Association is doing on some matter in which they are interested.

After the last session of the February meeting of the House of Delegates in Chicago, I went to the janitor who was cleaning up the meeting-room and was able to secure about a dozen extra copies of the Report and Recommendations of the Special Committee for Peace and Law Through United Nations. After returning home, I distributed these copies to friends—lawyers, doctors, and businessmen. Everyone who got a copy was enthusiastic about it, and not only called me up or wrote that they had read the report, but stated that it was the first time they had been able to get a clear

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Each month members of the Journal's Advisory Board are asked to contribute a signed editorial. In this way we hope to be able to reflect the many facets of opinion, and the active interests, of lawyers, judges, and teachers of law, in all parts of the United States. The views expressed by each contributor are his own, and are not necessarily those of the Advisory Board or the Board of Editors.

idea as to the Connally Amendment to the World Court and as to a practicable program for the control and utilization of atomic energy—and they asked why such a report had not been published in the press. Publishing such things in the JOURNAL is not enough, if we want to get our story across.

Why can't we get the press to give us better coverage? Review in your mind the work and accomplishments of the Association for the past few years, and how much of it does the general public know about? Recall as you can the outstanding services of the Association through its Committees on War Work, the Judiciary, Administrative Procedure, the Bill of Rights, Legal Aid, Legal Education, The United Nations, and its service and program in a variety of other fields. Is there no news value in anything which is not sensational or destructive?

The best way to improve the public relations of our profession is to keep the public informed, and as promptly and fully informed as possible as to the many things which the Association is doing for the public. Ours is in no sense a selfish service for the advancement of lawyers. It is an unselfish public service of a high order of competence. The whole body of American lawyers and the public generally should be told about it—and would appreciate being told about it as *news*.

We shall have a greater unity, a vast increase in concerted and individual efforts for our common ends, and a heightened effectiveness for all our undertakings, if our members and the public find in their newspapers the *news* of our work.

FRANK E. HOLMAN

Seattle, Wahington

■ *What Is the Matter With Our Law Schools?*

"The A students become teachers of law, the B students become Judges and the C students become practicing lawyers".

So runs the prevalent jest regarding law students, but my observation convinces me that the saying is more truth than jest.

I remember my classmates at the Yale Law School a generation ago, and I do not recall a single high-stand man who is not now a professor of law. I look around at other younger men I have known, men who were high-stand students in the law school; and I see almost none of them practicing law in the trial Courts. The few of them who are attempting to practice law make rather fumbling efforts in the hurly-burly of the trial Courts. I wonder why.

There is no doubt that the law schools have improved many times over in the last fifty years. Their graduates now, especially their high-stand men, leave school trained thoroughly in their studies in virtually all branches of the law. They are not legal parrots, repeating unquestioningly legal principles stated by someone else in the books. They know the reason for these laws. They are tough-minded. They can, and do, criticise bad laws, unsound decisions; their criticisms are shrewdly and closely reasoned, well-based and often unanswerable. They have a forward-looking viewpoint; they are open-minded as to needed judicial reforms. Their minds are not static.

So far as the law goes, they are well-educated young men. They *know* law. There is no doubt about that. But, in the words of my friend and classmate, Professor Karl Llewelyn of the Columbia Law School, they do not know "lawyering". And it seems to me that the high-stand men seem to be least fitted for "lawyering".

The reason for this I do not know, but of the fact I am convinced.

What do they mainly lack? I should say they lack aggressiveness, the necessary partisanship for a client's cause, the spirit of advocacy, that are so essential to the success of the trial lawyer. But it goes deeper than that. They seem to lack practical judgment, they seem to know too much law (if that is possible) and too little human nature. They lack that practical resourcefulness that knows instinctively when to press hard for victory or to turn, by a quick wit, defeat into victory. They cannot talk to a jury. They cannot reason in the common language of common men. They seem like actors who know their lines letter-perfect but can not act the play.

Is there something in the intellectual atmosphere of our law schools that unfits their students, their best students, for the active practice of law in the trial Courts? Do the law teachers unconsciously train their best students into a turn of mind that unfits them for anything but the rarefied legal intellectuality that scorns common application? Are these students over-intellectualized? Are the law professors, possibly in their own defense, unconsciously reproducing themselves intellectually? Do they tend to breed a race of legal scholars and that alone?

In the March issue of the JOURNAL (pages 259-261), Reginald Heber Smith reviewed *Clinical Preparation for Law Practice* by John S. Bradway. The suggestions made in that book, as quoted by Mr. Smith, are excellent. But they all deal with the time after the student has left the law school.

It seems to me that it is highly essential for our law schools to teach "lawyering" as well as law. Can they do it? I do not know. How can they do it? I do not know.

But I do believe it is highly important that our law schools shall in some way teach "lawyering" to more of their A-students, if we can expect our system of justice to continue to function as it should.

PHIL STONE

Oxford, Mississippi

Editor to Readers

▪ Several of our readers have told us that they are making use of our summary of specific items of the broadened work of our Association for the profession and the public, which was published on pages 299-301 of our April issue. They find this recapitulation useful in soliciting membership and also in explaining our Association's activities, in their informal talks before local Bar Associations and other groups. This was a primary purpose of our summary—not a defensive justification of the dues increase, but an affirmative showing of the many-sided usefulness of our Association to all lawyers and to our country.

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We had expected to be able to publish in this number an authoritative exposition of the opposing view of the questions of law and legislative policy involved in the *Girouard* decision (326 U. S. 714), in rejoinder to the presentation made in our February issue (page 95). Unfortunately, the distinguished author has not completed his article in time for inclusion. It will appear in our June issue.

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In accordance with our policy of giving to our readers, so far as our space permits, reasoned expositions of differing points of view on major questions of legal and public policy affecting the profession and the public, we publish in this issue an earnest statement of a plan for progress toward "world repose under law," through adding to the machinery of "world government for world affairs" and strengthening The United Nations Organization. The author is a member of the (Hanover) Pennsylvania Bar, who has not previously contributed to the great discussion. In June, we expect to publish an exceptionally able argument by a distinguished and public spirited lawyer in favor of a World Federal Union, with perhaps some comment on it in that or a subsequent number, so that our readers may be informed as to that proposal. Meanwhile, the Association's stand, and our own, remains that unanimously voted by the House of Delegates—united and undivided support of The United Nations.

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Some of our member-correspondents, in expressing their disagreement with views voiced in our columns on some current question, have suggested that the Association and its JOURNAL should be "impartial" or neutral. They have urged that the JOURNAL adopt and apply to itself the policy expressed in its February editorial (page 148): "Impartiality Is Essential". That editorial was in advocacy of impartiality and fairness as pre-requisites for those who are to perform *quasi-judicial* functions in the administrative agencies. We note that some of those who would have the JOURNAL "impartial" or mute on great issues have been antagonistic or silent during the long struggle for impartiality on the part of those vested with judicial or quasi-judicial duties. Be that as it may, the JOURNAL does not intend to be neutral, impartial or silent, as to the objectives of our Association and the great issues which gravely concern the profession and the people. Factually, we shall take pains to give dependable information. On questions on which our members reasonably divide and differ, our aim has been and is to treat opposing views fairly and to give space to them, when we can, if that course seems likely to aid an informed public opinion. Beyond that, we shall actively champion the policies and principles declared by our Association and shall urge their application and extension in such specific situations as arise. No member is expected to yield his individual opinions to the Association or its JOURNAL. Reasoned disagreements and active controversies will continue to find a welcome in our columns. We shall try not to be dull or unfair, but we shall hope never to be neutral or "impartial" on the great issues on which our profession has a public duty to inform and lead.

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Frank E. Holman, of Washington State and the House of Delegates, contributes a most timely editorial to this issue. He is anxious that the meetings and work of our Association shall be more fully reported in the daily press; also, that the JOURNAL shall be placed in the hands of legislators, judges, educators, leaders of public opinion, who will be helped by it. More than with any other problem, the leadership of the Association is at work on this problem of public information and public relations. We of the Board of Editors have been increasingly concerned to find that the JOURNAL is not read closely by many of our profession who need it most, and is read very little by non-lawyers. Inherently, the task is one on which the active cooperation of very many members will be needed. Several of our members obtain additional copies of each issue and send them with personal letters to newspaper editors, educators, members of the Senate and House of Representatives, judges, radio commentators, and the like. The results from this calling attention to particular articles have been noteworthy. Mr. Holman's forthright observations concern particularly the news coverage of Association work, in the daily press; they should be earnestly considered.

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Judge Earl C. Michener, of Michigan, Chairman of the House of Representatives Committee on the Judiciary, informs the JOURNAL that the Sub-committee on Immigration and Naturalization has pending before it two bills which would deal correctively with the subject matter of the *Girouard* decision of the Supreme Court as to the admission of aliens to American citizenship,

which was discussed in our February issue (page 95). These are H. R. 2286, introduced on February 27 by Congressman Dolliver, of Iowa, and H. R. 2444, by Congressman Gossett, of Texas, introduced on March 10. A copy of the JOURNAL article has been made a part of the record before the Sub-committee. As other views are expressed through our columns, they will be submitted for reference. Meanwhile, those members of the Association who have views on the subject will do well to communicate them to the Committees on the Judiciary in the Congress and to their Senators and Representatives.

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One who reads John Dickinson's ably-documented demonstration of his conclusions as to the "judicial review" provisions of the Administrative Procedure Act will hardly escape his confirmation that the legislative history and intent of the Act have been largely reflected in many issues of the JOURNAL and the Annual Report Volumes of our Association, from the time when our Association began its long fight for remedial legislation aimed at arrogations of arbitrary power by some administrative agencies. For the official documents and records as to the history of the drafting and development of the review provisions finally enacted, Mr. Dickinson refers conveniently to the *Congressional Record* and to the JOURNAL and the Annual Report Volumes, for excerpts which are supplementary. The same thing would be true as to the other provisions of the Act. Likewise, in his pragmatic comment on the present-day avalanche of judicial opinions, Judge Hanson's documentation includes many references to the JOURNAL. Whenever a need for research arises as to any Association matter, such as George M. Morris' delving into the embryonic public relations activities of our Association over the years, the indispensable sources are the Annual Report Volumes, the JOURNAL, and the indices in each of our December issues. The history of the Association's many legislative efforts, the evidences of legislative intent, the details of proposals to improve the administration of justice in its varied aspects, have been faithfully reported in the JOURNAL, whose files remain the best record, an invaluable resource of the profession on great issues, as John Dickinson's discussion exemplifies.

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The Erskine M. Ross Essay Competition for 1947 closed May 1. Many lawyers, judges, and law teachers, in virtually all parts of the country, submitted the fruits of their studies. The subject was one of the most vital problems confronting our profession and the world today—the practicable ways and means of improving the methods of international legislation, the law-making that deals with world matters which are beyond the power of any one Nation to solve and surmount. Early in June, the essay winning the $2500 prize made possible by the testamentary benefaction of a devoted friend of the Association, will be selected and announced. Soon thereafter it will be published in the JOURNAL. As has almost always been the case, this year's essays will doubtless prove to be constructive contributions to the informed discussion of a great subject.

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Under the provisions of the Administrative Procedure Act sponsored by our Association, the *Federal Register* is the important official medium of information essential for practising lawyers. As a matter of comity and cooperation with the Division of the *Federal Register* of the National Archives, which has responsibility for the preparation and issuance of the *Federal Register*, we give space on page VIII to an advertisement which will acquaint our readers with this publication and the way to obtain it.

Had This Lawyer Other Faults?

■ The London *Sunday Times* refers to an incident in which John Milton, the British poet, replying to a lawyer who had differed with him on a political subject, called his adversary a beast, a cock-brained solicitor, a low puddler, a mere and arrant pettifogger, a pork who never read any philosophy, an unbuttoned fellow, a boar in a vineyard, a snout in pickle . . . the shame of all honest attorneys, an unswilled hogshead, a tradesman of the law whose best ware is only gibberish, a serving man and Solicitor compounded into one mongrel . . . an apostate scarecrow, a vagabond and ignoramus, a beetle, a daw, a horsefly, a nuisance and brazen ass.

Charles Seymour Whitman

1868-1947

■ Charles S. Whitman, the forty-fourth Governor of the State of New York, forty-ninth President of the American Bar Association, and member of its House of Delegates, died in New York City on March 29, in his seventy-ninth year.

He had been a member of our Association since 1913, and had served it in many capacities and with unflagging interest. He had a host of devoted friends among lawyers in all parts of the United States, who admired and loved him for his fidelity to the institutions of our country and to the ideals of our profession. After John W. Davis, and Charles E. Hughes, he was the senior living Former President of our Association.

His passing brought to a close a career of great distinction and public usefulness, in an era when men and issues were different from what they are today. He achieved high reputation as a judge of criminal Courts, won National fame as a prosecutor of graft and crime in police administration, was accorded an unopposed re-election as District Attorney of New York County, was twice elected Governor of New York, rendered patriotic and distinguished service as war-time Governor, and would have been chosen for a third term decisively but for the tragic consequences of a rapid transit motorman's rash carelessness on the eve of the 1918 election. Had he been the third-term Governor of New York in 1920, his nomination and election as President of the United States, instead of Warren G. Harding, might well have taken place. His defeat by Alfred E. Smith for the Governorship started a chain of political and public consequences which profoundly changed the history and the institutions of America. As a lawyer, he will be remembered most for his outstanding services as a prosecutor and for his ability to surround himself with energetic and able assistants who later rose to high places in judicial and professional life.

■ Mr. Whitman was born in Hanover, Connecticut, on August 28, 1868, the son of the Reverend John Seymour and Lillie (Arne) Whitman. His father and his grandfather were Presbyterian clergymen of rugged faith. His father held pastorates in several communities, including Williamstown, Massachusetts, and the Western Reserve region in Ohio. The son attended schools in the communities his father served. Happy days of his young life were spent in Ohio, of which he often spoke.

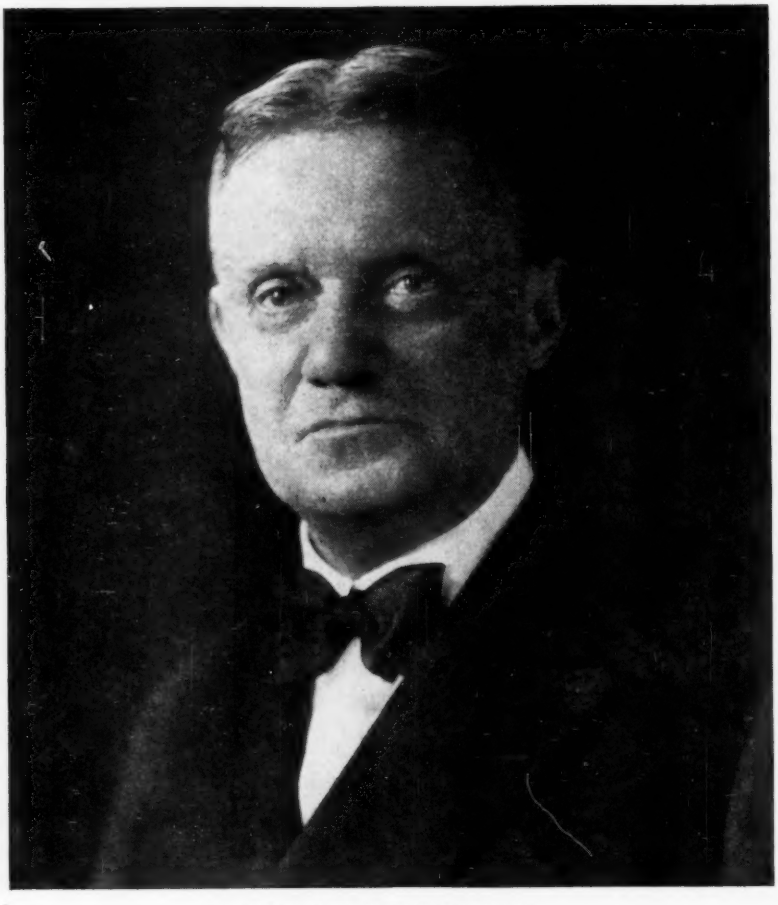
He attended Adelbert College (Western Reserve) for his freshman year. He then lived in Canfield, Ohio. As his father and grandfather had been alumni of Williams College, he transferred to take his sophomore year at that institution. A part of what is now the President's House at Williams had been his grandfather's home. Transferring to Amherst College before his sophomore year was over, young Whitman was graduated in 1890. Four years later he obtained his degree in law at New York University Law School. Meanwhile, for self-support he was a teacher in Adelphi Academy, in Brooklyn, in which post he was succeeded by his friend and fellow-alumnus at Amherst, Harlan Fiske Stone, late Chief Justice of the United States.

Service As a Judge of Criminal Courts

Whitman's rise in public affairs and in leadership for good government was rapid. First he was an assistant Corporation Counsel, assigned to represent the City of New York at the State capital, and then was legal adviser to Mayor Seth Low. The last official act of Mayor Low is said to have been the signing of Whitman's commission as a City Magistrate. His crusading propensities soon manifested themselves in spectacular ways. He waged war on the bondsmen's racket, which preyed on unfortunate women of the street. He drew, and personally secured the passage of, the bill creating the famed Night Court, which assured that palpably innocent persons would not have to buy their release from a night in jail by turning to professional bondsmen who split their fees with the arresting officers. In 1906 he became Chairman of the Board of Magistrates.

Governor Charles Evans Hughes in 1907 appointed him to the Court of General Sessions, which had general criminal jurisdiction. After serving until the end of the year, he took up the practice of law. In 1909, the forces opposed to Tammany Hall could not agree on a candidate for Mayor but did agree on nominees for other offices. Whitman was chosen for District Attorney on two tickets and defeated the Tammany nominee.

His administration of that office was colorful in the extreme, but back of it all were the energy and skill of



CHARLES SEYMOUR WHITMAN

the incumbent and the zeal and loyalty of the first-rate lawyers he gathered around him. Most spectacular of all these, but only one of many, noted prosecutions was the Rosenthal case, which held the attention of the Nation for months and years. Herman Rosenthal, a cheap and notorious gambler, gave to the New York *World* on January 15, 1912, an affidavit which charged that a Lieutenant Charles Becker, of the Police Department, was blackmailing him as the price of protection. The *World* reporter told the District Attorney, who made an appointment with Rosenthal for the following day.

A few minutes before 2 o'clock on the torrid morning of July 16, 1912, Rosenthal was called from the dining-room of the Hotel Metropole to the street. Shots rang out in West 43rd Street, a few doors from Broadway: A slate-colored automobile raced eastward; Rosenthal was dead on the sidewalk; the slaying had been skilfully planned and executed; the forces of corruption and protected vice felt safe again.

District Attorney Whitman was quickly notified. Unexpectedly, he went immediately to the scene and took personal command. He said later that he believed that the conviction of the four hired gunmen-slayers and their principal, Lieutenant Becker, was "due in large measure to my getting out of bed and going to the Metropole Hotel and the station-house that morning". Things which he saw and heard in those early morning hours gave him "leads" which led to the "murder car", to intermediaries, to the actual slayers, and to a good idea as to the probable instigator, before the police and the underworld could close or confuse all the trails.

Then followed trials that were breathtaking in their drama. "Lefty Louie", "Dago Frank", "Whitey" Lewis, and "Gyp the Blood," were convicted and sent to the electric chair. Becker was convicted before Recorder Goff, despite his claims of innocence and the desperate efforts to save him. The Court of Appeals granted a new trial, because of errors on the first. Re-trial before Justice Samuel Seabury resulted in conviction again of murder in the first degree. Prewar New York was shaken as never before, and its intrepid District Attorney received the acclaim of the City, State and Nation. In 1913, a Republican effort to make him the nominee for Mayor was fortunately unsuccessful in the Fusion Committee; but his re-election as District Attorney was so certain that Tammany dared not withhold its nomination.

His Two Terms as Governor of New York

In 1914 he was decisively elected Governor of New York. A dramatic incident was that as Governor he had soon to pass upon the application for clemency or commutation of sentence for Lieutenant Becker, whom he had convicted as District Attorney. Believing that Becker was guilty beyond a doubt, he refused to intervene. Becker died in the electric chair.

When Whitman was renominated for Governor in 1916, Samuel Seabury, a great crusader of a later era, stepped down from the Court of Appeals to take the nomination against him; but Whitman was re-elected, to become the Governor of New York during World War I. His administration was characterized by his staunch support of many constructive measures, the story of which has been well told recently by Julius Henry Cohen in *They Builded Better Than They Knew*. He worked closely with the Bar Associations and with the presiding judges of Courts to improve the administration of justice and obtain well-qualified men for judicial office. Above all, his in-

tense patriotism led him to throw himself with whole heart and spirit into all tasks arising from the war and see to it that the State and its people were mobilized in aid of the war effort.

When 1918 came and he was renamed for a third term, with Alfred E. Smith as opponent, his re-election was generally expected and predicted. But a very few days before election, a reckless motorman let a subway train run too fast down a curving grade. Swaying cars hit the mouth of a tunnel; many people were killed and hundreds injured. Charges were made in newspaper advertisements that The Governor's Public Service Commission should have foreseen and prevented the disaster—just how, was not explained.

There was not time to overtake and correct the imputations made, in a great city shocked by a tragedy which bereaved many families. With more than 2,000,000 votes cast, Whitman was defeated by 14,842 votes. In the opinion of many observers at the time, this margin would have been overcome if provision had been made for voting by the many thousands of New York men who were overseas at the time.

Governor Whitman was then widely talked of and favored by many persons as a probable nominee for President of the United States in 1920. Had he been re-elected in 1918, he would have been a most formidable candidate in the Republican National convention. "What might have been" seemed never to sadden or embitter his life or dull his interest in public affairs.

When he left Albany at the end of 1918, he joined with Ex-Judge Nathan Ottinger, Ex-Judge William L. Ransom, Robert E. Coulson, and Jacob H. Goetz, in forming the law firm of Whitman, Ottinger and Ransom, which became Whitman, Ransom, Coulson and Goetz upon Judge Ottinger's early retirement. Governor Whitman remained a member of the firm until his death, although he had not been active in it for some years.

He remained interested and active at times in political affairs, especially in the Fusion Committees which selected candidates to oppose Tammany nominees. In 1925, he was prevailed on to be a candidate for District Attorney again, against Joab H. Banton; but the times and issues had changed, and his name and record no longer held the old magic. He was defeated.

Governor Lehman appointed him a Commissioner of the Port of New York Authority in 1935. He was reappointed in 1942 and was made Chairman of the Committee on Port Planning in February of 1945.

His Interest in the American Bar Association

From the time he joined it in 1913, he was actively interested in our Association and its work. After he became in 1919 a lawyer again in private practice, he regularly attended meetings of the Association, was for a time the New York member of the old General Council (corresponding somewhat to the present State Delegates), and served on various Committees. Of these the most notable was that which studied the causes of crime and the reforms needed in the laws and procedures for the punishment of crimes. The Committee made extensive factual surveys and studies, in this country and abroad, and submitted constructive recommendations. In a sense this was a forerunner of projects undertaken by the Association in the public interest in many fields. He was Chairman of the Committee in 1923-26.

At the Denver Annual Meeting in 1926, he was elected President of the Association for 1926-27. He devoted the year wholly to the duties of this office and visited the State and local Bar Associations in many localities. He valued and enjoyed most the many staunch friendships which he formed in the work of our Association; these lasted to the end of his life.

Other Details of His Life and Interests

He was married in 1908 to Miss Olive Hitchcock, of New York. She died May 29, 1926. Their children were Olive, now Mrs. John J. Parsons, and Charles S. Whitman, Jr., who is a member of the New York Bar. He had five grandchildren at the time of his death (four grandsons and one granddaughter); a second granddaughter was born the day after his funeral.

Throughout his life, he was proud of his early American ancestry and was interested in the work of the patriotic societies in which he thereby belonged. These included the Society of the Cincinnati, the Society of Colonial Wars, the Sons of the Revolution, the Sons of the American Revolution, and the St. Nicholas Society. He received the degree of Doctor of Laws from Williams College, Amherst College, New York University, and Hamilton College.

Members of our Association who formed friendship with Governor Whitman after his retirement from public office and the political hustings were impressed most with his human qualities, his consideration and thoughtfulness for others, his capacity for abiding friendship and congenial association. These were life-long characteristics; many manifestations of them could and should be told. To mention one: Except in a very few instances where that was impossible, he visited as Governor the family of every New York State man who gave his life in World War I.

But those who knew him in his halcyon days as a judge, prosecutor and Governor, recall also his courage, his energy, his thorough preparation, his court-room skills, his fairness and high standards of conduct, and his capacity for the dispatch of public business. The New York *Herald-Tribune* said of him on March 31: "He was of a tradition of great competence." The New York *Times* said that "For much of this improvement" in political morality in the present century, "Charles S. Whitman could rightly claim credit". To the members of our Association, the ascendant mood is a sense of loss that a friend has gone, a leader who served us well in his time will meet with us no more.

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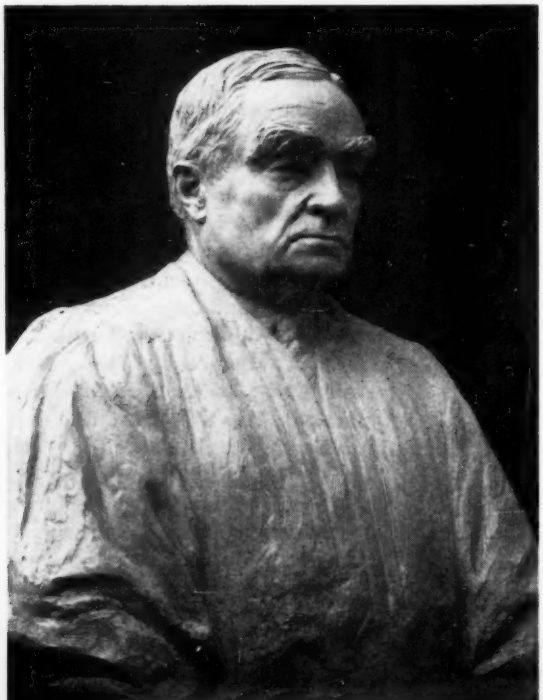
Judge Learned Hand:

Honored by Harvard Law School

■ Friends and associates of Judge Learned Hand gathered at the Harvard Law School on April 2 to honor one of America's outstanding living jurists.

In an impressive ceremony in the classic Court Room of Langdell Hall, a bust of the senior Judge of the United States Circuit Court of Appeals for the Second Circuit (New York) was unveiled, before a throng of men and women who had known him in the classroom, at the Bar, in the work of the American Law Institute, in chambers or in social life. Students of the Law School had known him only in the case books.

The massive bust— a striking likeness in bronze, by Eleanor Platt, New York artist—was a gift to the Law School from Judge Hand's law clerks and the Harvard Law School Association. It will take its place in the Law School Library, with the many busts and paintings of great lawyers and jurists of the past.



The ceremony honoring Judge Hand, who has served with distinction on the Federal bench through nearly 38 years, was simple and without undue formality.

In opening remarks, Dean E. N. Griswold of the Law School recalled that he first came upon the works of Judge Hand in the case books of his own student days, and recalled with relish his own first encounter with Judge Hand in person as a lawyer at the Bar.

For the donors, Orrin Judd, of the New York Bar, recalled with gratitude his valuable experience as a law clerk to Judge Hand. Mr. Judd then drew aside the crimson flag which draped the bust.

The principal address, an appreciation and appraisal of Judge Hand, was given by Judge Thomas D. Thacher, of the New York Court of Appeals. Judge Thacher took his text from a letter he had received from Judge Hand, who counselled: "'Nothing extenuate.' Them's my sentiments." Giving an intimate sketch of Judge Hand's character and philosophy, Judge Thacher concluded:

"His beliefs have clothed him with true humility and with a conscience which spares him never. Couple these with his learning and his craftsmanship and we have a great judge."

The meeting reminded many present of a similar occasion, some years ago, when Judge Hand made the presentation speech in giving the Harvard Law School a painting of Oliver Wendell Holmes. It was recalled that, on that occasion, Judge Hand had said that the portrait of Justice Holmes "need not flinch" before the portrait of Chief Justice Marshall, which it faced. Those present at this month's ceremony agreed that the bust of Judge Hand likewise "need not flinch" before the illustrious company it has joined.

Lanham Trade-Mark Act:

House of Delegates Asks Amendments

■ At its meeting in Chicago on February 25, the House of Delegates adopted a Resolution (33 A.B.A.J. 404; April, 1947) which asked for numerous amendments of the Lanham Trade-Mark Act of 1946 (Public Law No. 489 of the 79th Congress; 60 Stat. 427), which our Association favored and which will go into effect on July 5. This unopposed action was taken upon the recommendation of the Section of Patent, Trade-Mark and Copyright Law.

Because the Resolution containing the text of the many changes proposed was so lengthy that it would have filled several pages of our April issue, we did not publish it in full, in our report of the Proceedings of the House (page 390-405). Many of the changes were textual and minor. In view of the importance and urgency of the subject and the differing opinions held by at least some members of the Bar as to the steps which their clients should take for needful protection before the Act becomes operative, the *Journal* has obtained from the Section a summary of the principal amendments presently urged by the Section and approved by the House.

For the information of our members, we also reprint from the current issue of the *Chicago Bar Record*, published by the Chicago Bar Association, excerpts from a statement prepared by that Association's Committee on Patent, Copyright and Trade-Mark Law.

■ The principal amendments of the Lanham Trade-Mark Act of 1946, approved by the House of Delegates on February 25 (33 A.B.A.J. 404; April, 1947), are summarized by the Section of Patent, Trade-Mark and Copyright Law as follows:

Section 14—Cancellation:

To provide for hearings.

To provide that during the contestable period a mark may be canceled on the ground that it was unregistrable at the time of application.

To make clear that failure to publish 1881 or 1905 marks under Section 12 (c) is not, of itself, a ground for cancellation.

To eliminate as grounds for canceling certification marks that the registrant himself produces or markets goods or services to which the mark is applied, or permits use of the mark for other than certification purposes, or discriminately refuses to certify the goods or services of others maintaining the standards or conditions which the mark certifies. Unless the Act is so amended, many certification marks, which are also used on goods and services, will be left without protection.

To eliminate the proviso giving the Federal Trade Commission the right to apply to cancel registrations on certain grounds. The Commission already has the power to prevent the *use* of any mark that is deceptive or unfair.

Section 15—Incontestable Right to Use:

To eliminate Subsection (4) which provides that

> no incontestable right shall be acquired in a mark or trade name which is the common descriptive name of any article or substance, patented or otherwise.

As Section 15 relates to a registrant's incontestable right to *use* his mark and not to his right to exclude others from using it, Subsection (4) logically belongs in Section 33, if anywhere. But Section 33 already provides adequate defenses against improper claims of incontestability, so no amendment to Section 33, by way of incorporating this Subsection, is necessary.

To provide that no incontestable right shall be acquired prior to July 5, 1954, thereby postponing incontestability for two years. This would tend to avoid any possible race for early registrations, or early publication dates under Section 12 (c), and simplify administration.

Section 32 (1) Remedies—Infringement:

To make actionable any unauthorized use of a registered mark in connection with the sale or advertising of goods or services which

> is likely to cause said mark to lose its significance as an indication of origin,

This amendment would give a registrant an affirmative right to proceed against those whose use of his mark may tend to cause it to become generic.

Section 33—Remedies—Effect of Registration and Defenses Against Incontestability:

Subsection (b) provides that in

CHARLES H. WALKER
Chairman, Section of Patent, Trade-Mark and Copyright Law

any action involving a registered mark, the use of which has become incontestable under Section 15, the certificate shall be conclusive evidence of the registrant's exclusive right to use the mark, unless any one of certain defenses or defects is established. Among these the seventh is

> That the mark has been or is being used to violate the antitrust laws of the United States.

The proposed amendment would eliminate this defense. There is some difference of opinion as to whether it is merely a defense against incontestability or a defense to the action. In any event, it should be eliminated, because it is not in the public interest that a trade-mark infringer should be permitted to continue to deceive the public by passing off his goods as those of the trade-mark owner, regardless of any question of Anti-Trust Law violation. Appropriate affirmative relief to enjoin and punish any use of trade-marks in violation of the anti-trust laws is provided by the Anti-Trust Laws themselves. Permitting charges of anti-trust violation in suits for trade-mark infringement would unnecessarily extend trade-mark litigation, harass trade-mark owners, cause them to hesitate to assert their rights, possibly persuade them not to bring their marks under the incontestability feature of the Act, and might even discourage registration.

Section 45—Definitions:
To correct the definition of "collective mark."

STATEMENT AS TO THE PROTECTION OF BUSINESS NAMES AND TRADE-MARKS

(Excerpts from Statement prepared for the Chicago Bar Record published by the Chicago Bar Association, by that Association's Committee on Patent, Copyright and Trade-mark Law (Vol. XXVIII—No. 7; page 278; April 1947):

"It is important to recognize that definite steps are now necessary to safeguard corporate names, trade-marks, and the good-will they represent.

"The Lanham Act[1] introduces to American law the theory of incontestable ownership of names and marks. No matter how beneficial such incontestable ownership may be to industry as a whole, as well as to those who qualify for its advantages, there are bound to be many instances in which it works to the great disadvantage of those who ignore the new Act.

"It is probable that most corporate names and other names under which business is conducted will be registerable under the Act either as trade-marks for goods or as marks used in advertising some sort of services.

"Although the new Act preserves most rights acquired before July 5 when the Act takes effect, proof of these old rights in years to come will often be difficult unless special steps are taken before July to preserve proof. Even such preservation of proof will apparently be of no avail where expansion of the old rights is involved. Accordingly, registration of marks, including business names, will be important wherever there is hope of expansion.

"The Lanham Act provides a new way for a competitor to establish that a trademark has become the common descriptive name of a product and may, therefore, be used by everyone. Many trademarks will be in a dangerous position unless the manner in which they are used is corrected.

"Promptness in trademark matters will now be of increased importance, even before July. The lawyer is, therefore, presented with a vexing problem: How can he suitably advise business generally of the Act's advantages (to the alert) and its disadvantages (to the slothful or uninformed)?

"Despite lively interest in the new Act, thousands of businesses will undoubtedly suffer because of their failure properly to proceed in accordance therewith. Businesses large enough to have constant services of trademark counsel will assumedly be fully advised of the possibilities. It has so far, however, been impossible for attorneys to impress the new law's potentialities upon the many thousand normally unadvised businesses. Many of the latter might vigorously resent the suggestion that they must now provide for annual legal expenses under the Act.

"Since the passage of the Act in July, 1946, legal and trade literature has been alive with new books and articles. Bar Associations, particularly those which include trademark lawyers and trade groups, have been studying the Act for several months. But the very businesses which should know most intimately about the new Act are not likely to read such literature or attend such meetings. The most they are likely to know is that the Lanham Act is advantageous for those who register their trademarks and that it is intended to discourage piracy of goodwill. Having no intention to engage in piracy and not wanting to spend money on trademarks, these concerns are content to learn no more. They do not realize that their own position may be adversely affected. . . .

"The major damage will arise because many businesses, including even those which have constant advice from counsel, have heretofore many times waited 'until something happened' even though they were quite early aware of potential conflict! It will no longer be possible so to proceed. Hereafter waiting 'for something to happen' will put powerful weapons in the hands of competitors."

1. Public Law 489, 79th Congress Chap. 540; 60 Stat. 427; 15 U.S.C.A. 1051-1127. Sections 46 to 50 of the Act are found in the footnote of 15 U.S.C.A. 1051.

"Books for Lawyers"

SAM JONES: LAWYER. *By Ben Jones. With Drawings by Dick Underwood. Norman, Oklahoma: University of Oklahoma Press. April 15, 1947. $2.75. Pages 218.*

In the Kansas prairie town of Lyons, late in 1887, the shingles of nine lawyers swung in the dusty air or were nailed flat against an outside wall or office door on the main street. One of them read:

LASLEY AND BORAH

Young Bill Borah had been admitted to the Bar there in September of 1887. On the south side of the square a tin sign flapped to tell that Sam Jones had started practice in the "boom" town at about the same time.

Folks told Borah that the then drought-ridden, short-grass country was a poor place for a young lawyer. A bachelor and free, he sought larger opportunities. So, just as "the boom busted" and the electric light plant, the street railway, and the brickyards, faded into the dust-clouds of false hopes, Borah left for Idaho, and became a famous Senator, one of the Nation's leading constitutional lawyers. Young Jones had given hostages to fortune, and he stayed on in Lyons, a "horse-and-buggy lawyer" in the eighteen nineties and thereafter until the automobile took the place of the horse. This massive, unconventional lawyer, with a "handle-bar moustache", had a good life, and evidently more fun.

Now his son Ben has written this racy and rollicking book about his father. Young Ben, a graduate in law from the University of Kansas, wrote it in the same offices his father used to occupy. The town has now grown to more than 4000 people, and Ben is a country lawyer on his own, evidently with the same zest for the law and life. The volume is a rich addition to the publications by which the University of Oklahoma has tried to preserve first-hand memories of the uproarious heydays of the open range, when elemental passions and motives contended for the mastery and men first found that natural gas and oil were underneath sun-scorched soil in the South-west country, just as golden qualities of loyalty and kindliness for the unfortunate were underneath men's rough exteriors.

For many lawyers, this vivid chronicle of a lively, unforgettable era and of a quick-witted, whole-souled lawyer of the plains will bring a nostalgia. For young men who are in the law schools or are floundering to find their place in the profession, the book will be good reading, because it will instill in their minds the rugged, bustling life and the sterling qualities of mind and heart which produced the independence and the resilience of the profession of law in America.

The sketches are of lawyers and of legal adventures in which craft sometimes shaded into cunning, sometimes into hokum and histrionics; yet these men were ministers and mouthpieces of their communities' insistence on swift justice and fair play. In obscure places, they played their parts without renown or riches, earned respect for themselves and for the law, were unafraid of judges corrupt or stupid.

Those were times and places where every law office was a Legal Aid office, for the poor and for persons of little means. The unfortunate and the needy knew that any "shingle" marked the entrance to advice and aid; towns like Lyons needed then no referral bureaus. The complexities and "overhead" costs of large staffs to cope with the myriad agencies and regulations of today were no barrier to the access of any needy person to any lawyer or law office. Each small town lawyer did, and could do, his full share of Legal Aid without risking insolvency.

Young Ben Jones has told his story well and with gusto. It has a virility and an exuberance which has been lacking in some stories of lawyers' lives and work in more prosaic eastern communities. It raises the question whether there can be as much fun, and as rich rewards in life's satisfactions, from practising law in large offices and settled communities, where the patterns give less of the unexpected. The answer must be in the affirmative, for ours is a profession of high adventures, as countless men could testify who labored gaily and with all their might in large-city offices during the years when Sam Jones was staging his unique celebrations of Ground Hog Day along the board sidewalks and windy streets of Lyons in west-central Kansas.

If any of the zest has gone out of law practice anywhere, that may have come from shortened work-weeks, slackened efforts, and the new philosophy that somehow society or the profession owe the lawyer a competence and security for which he need not strive.

This old-school practitioner lived in a day when the individual lawyer had to learn how to do everything that was done for his clients. The time fortunately had not come when law business belonging in small cities and towns is taken long distances to large cities in order that it may receive the omnibus handling that can be given by a well-staffed office which has specialists for almost ev-

ery phase of legal work. One wonders whether, in this atomic age with its potential terrors of mass-destruction, there will ever come a trek of industry, business and population out of the great urban centers and back to the security of towns scattered on plains and prairies. If so, the lawyers will not be far behind.

The book at times portrays Sam Jones as a Kansas edition of Perry Mason, but also a scourge of "city slickers," a "father confessor" to his community. The son can be forgiven for making his father the adroit and picturesque "hero" of his tales from life and for omitting the cases and incidents which no doubt took place but would have been less colorful, perhaps less flattering. Although not well-rounded as a portrayal of a lawyer's life in such a town, the book inspires an expression anew of the hope that, before it is too late, the recollections of the rugged years in our profession will be reliably and as readably recorded, in all of the States, as a part of the heritage of our sons and successors. Any lawyer, old or young, should have doubts about himself if he does not get good fun and real enjoyment from reading these breezy sketches of an era that is gone.

WILLIAM L. RANSOM

New York

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW – 1945. *London: Oxford University Press. April, 1947. $7.00. Pages vi, 341.*

This is the twenty-second issue of the Year Book. Founded in 1920, it was edited successively by Sir Cecil Hurst, Professor A. Pearce Higgins, E. A. Whittuck, Professor J. L. Brierly, Sir John Fischer Williams, Professor A. D. McNair, and again Sir Cecil Hurst. The publication of the Year Book, suspended after the 1939 issue, was resumed in 1944 under the editorship of Professor H. Lauterpacht.

The 1945 volume, just published, contains eleven articles, six notes, a summary of English decisions involving points of public or private international law during the years 1943-4, and some thirty book reviews. Legal historians will be interested in J. Walter Jones' evaluation of "Leibnitz as International Lawyer." A pioneering study of constitutional problems of international organizations by C. Wilfred Jenks, the Legal Adviser of the International Labor Office, contains a wealth of material on the structure and powers of general and specialized international organizations. G. G. Fitzmaurice contributes a study on modern contraband control and the recent developments in the field of prize law. George Schwarzenberger traces the evolution of the most-favored-nation standard in British state practice since 1417. J. Mervyn Jones elucidates the problem of "British protected persons," a category of British nationals to be distinguished from "British subjects." The attempt to limit the protection of nationals abroad by means of the Calvo Clause is criticised scathingly by K. Lipstein. The jurisprudential controversy concerning the word "law" in the phrase "international law" is examined exhaustively by Glanville L. Williams of the University of London.

Professor H. Lauterpacht adds three carefully documented chapters to his previous studies of the thorny problem of recognition. The Chicago Convention on Civil Aviation forms the background of the article on "International Civil Aviation and the Law", by R. Y. Jennings. The influence of "the cannon-shot rule" on the development of the three-mile limit of territorial waters is discussed minutely by Wyndham L. Walker. An article on the transfer of chattels in the conflict of laws by J. H. C. Morris rounds out the volume.

The current compilation lives up to its predecessors. It is a valuable contribution to the crystallization of principles of international law and to the understanding of the processes of its evolution.

LOUIS B. SOHN

Cambridge, Massachusetts

THE CRAVATH FIRM AND ITS PREDECESSORS: 1819-1947. *Volume 1. By Robert T. Swaine. New York City: Privately printed; copies not available for purchase. 1947. Pages xxi, 782.*

This is the first volume, excellently printed, to give the history of what is today one of America's largest law firms. It covers the eighty-seven years from 1819 to 1906, through what is called "The Guthrie Period" of the firm, when William D. Guthrie was its guiding spirit and head. A later volume will cover the forty years then ensuing, when Paul D. Cravath gave the firm the quite different philosophy of organization and system which still prevails. The book was intended primarily for distribution among present and former associates of the firm; copies are not available for purchase. It is to be found now in the principal law libraries, including those of the law schools.

Historically the Cravath firm's practice, Mr. Swaine tells us, stems from two roots: One in New York City dating from 1819 with Richard M. Blatchford as its founder; the other in Auburn, in central upstate New York where in 1823 William H. Seward began practice as Miller & Seward, with Ex-Judge Elijah Miller and later with Samuel Blatchford. The two branches united in 1854 when William H. Seward became United States Senator, later the contender against Abraham Lincoln for the Republican nomination for the presidency and Secretary of State in the Lincoln Cabinet. His nephew Clarence A. Seward, with Samuel Blatchford and another Auburn lawyer, then joined forces in New York with Richard M. Blatchford as Blatchford, Seward & Griswold. It was known as the Blatchford firm for some sixty-five years until 1885, with Samuel H. Blatchford, later United States Supreme Court Judge, and Clarence A. Seward, as its principals. It was known as the Seward firm for some sixteen years later with Clarence A. Seward as its senior and with William D. Guthrie rising in its

ranks, and became and was the Guthrie firm—Guthrie, Cravath & Henderson—until 1906 when Mr. Guthrie withdrew. At this point this volume ends.

This is a thoroughly honest book, the preparation of which must have required an enormous amount of research. It gives us the facts, sometimes in too great detail, of the lives and activities of the firm and its members during these eighty-seven years. It leaves conclusions to the reader. In a way it affords a sort of panorama of American life and growth. It should prove a source book for no inconsiderable part of American history, particularly in the Seward period.

In the early days its work was concerned largely with patents and patent litigation. William H. Seward and Samuel Blatchford were highly successful patent lawyers. Many of the great basic patents of early American ingenuity were established through their efforts—Jethro Wood and his all-metal plow, the first in history; Elias Howe with his sewing machine; Morse and his telegraph; McCormick and his reaper. Charles Goodyear and his vulcanizing process as to rubber brought business to the firm. It represented—alas, too successfully—Day in his lifelong controversy with Goodyear. Later came the Bessemer processes on steel and their American licensees, and Edison with his electric lamp.

We have the Tweed period with its venal judges and the part played by the Blatchford firm then in the scandals of the era. Clarence Seward worked, in the main, during this period for "the Erie gang"—Gould, Fisk and Drew. The Bible tells us: "He who touches pitch shall be defiled". There was, of course, plenty of pitch to go around. Moreover, during those years Seward was constantly practicing in the Federal Courts, "probably more than any other lawyer of the city" before his former partner, Judge Samuel Blatchford, whose son remained then a member of Seward's firm—a connection which doubtless generated hopeful anticipations by the Erie crowd and other clients whom Seward represented. That there should be criticism was inevitable. The firm and Judge Blatchford considered it baseless. The connection could not have proved injurious to the business of the firm.

Then came in the eighties the entrance of the firm into street railway matters in New York with which it was long connected. It began with "the Boodle Aldermen" and the investigation and conviction of Sharp and Jaehne, an investigation which came from the disappointment of the Widener, Elkins, Ryan and Whitney associates over street railway franchises. Mr. Seward was one of the counsel in the investigation.

The book is mainly the history of the continuity of industrious and exceptionally able lawyers—two Sewards, Blatchford, de Costa, Morawetz, Steele, Guthrie and Cravath—and the accretion of professional work resulting therefrom. With the exception of William H. Seward, whose career was probably a horrible example to them, the partners avoided public affairs except when their clients were involved.

The firm's practice was changed in the eighties mainly to the field of corporation law. The profitable period had then begun. It would be impossible to attempt to give even a list of the great corporations in whose organization in the days of boom the firm participated, or the railroad reorganizations and the like in periods of depression. The firm's clients, particularly those interested in street railways in New York, often included those who had no intentions of making corporation organization a form of philanthropy and whose purposes did not include any particular consideration of the public. This, however, was all in the era long before the Security and Exchange Act and when statutory corporation law was full of undesirable loopholes. Later resultant scandals and public clamor were almost inevitable.

From the eighties on, the firm developed partners capable of handling this increasing mass of corporate business. Such litigation as the firm had, with the exception perhaps of the great Plant Will case, was almost wholly in property cases—intricate, difficult and involving large sums.

It is the last phase of the firm's life covered by this book with which we are most concerned—the so-called "Guthrie Period". William D. Guthrie came to the firm in 1875 as a messenger. Admitted to the Bar at twenty-one he reached with almost incredible rapidity a professional eminence. He was in a strictly professional sense a great lawyer, intense, resourceful and thorough, with a distinct gift for clear exposition, tireless in the demands he made on himself and on others who worked with him or for him. He exhausted the last ounce of his and their vitality.

Ambitious and acquisitive and a shrewd negotiator, Guthrie was also contentious and difficult. He was essentially a property lawyer. He brought to the defense of property an almost Messianic zeal, particularly evident in the income tax and graduated inheritance tax cases in the United States Supreme Court. The income tax case (*Pollock* v. *Farmers Loan & Trust Co.* 57 U. S. 429) was one of his devising and generalship, and he made the opening argument in the Supreme Court. His property consciousness was at its worst when he was defending the Pinkerton iron and steel police in their killing of strikers in the Homestead affair, in which he indulged in a fierce and sweeping denunciation of labor unions.

Mr. Swaine's picture of Guthrie is clear and frank. He is equally clear and frank in his picture of the partner who for a time worked with him and finally broke with him, Paul D. Cravath.

Mr. Cravath was quite as difficult as Mr. Guthrie. Those of us who remember him recall a handsome man of great stature, six-foot-four, with massive head, ruddy complexion and piercing blue-grey eyes. Unlike

Guthrie he had no instinct for litigation and no liking or capacity for courtroom forensics. He was strong-willed. Mr. Swaine says: "Seldom was he a party to a conference that he did not dominate by his driving personality with its ruthlessness tempered by persuasiveness and a patient regard for the opinions of others. He would first try to convince and argue away opposition, but he could ride roughshod over those he could not convince. Usually he succeeded, one way or the other, though feelings often were hurt. In abstract reasoning of a pure question of law, Cravath was not the equal of either Guthrie or his later partner Henderson, but in diagnosing a practical corporate law problem he had no superior among his contemporaries. Cravath was essentially an extrovert with unbounded determination and self confidence, intolerant of incompetence and inefficiency, and with contempt for mediocrity."

Cravath had a sense of humor but he did not use it until his old age. He carried his sense of organization into his own firm. He built up this law firm as he would build up a corporation. He was a master of the art of delegation. He kept moving through his office a current of brilliant, ambitious and very hard-working young lawyers, many of whom later became important bankers, corporation executives, and outstanding leaders of the Bar. It was his theory that there should be someone in the firm sufficiently experienced to handle any form of worthwhile practice which came to it. As Mr. Swaine tells us, this method of developing legal personnel has today become in varying degrees a common practice in many of the larger New York offices; but the Cravath firm under Cravath's guidance developed it earlier and more systematically.

Two partners so strong willed and so unlike could not long work together, though each recognized the other's powers and abilities. Guthrie retired at the time when the public press was full of the street railway scandals in 1906. From 1906 until his death in 1940, Paul Cravath was the head of his firm. But, as Mr. Kipling said, "That's another story", and we must wait until Mr. Swaine finds time for Volume Two to complete it.

GEORGE W. ALGER

New York City

THE CHEQUER BOARD. *By Nevil Shute. New York: William Morrow and Company. April, 1947. $2.75. Pages 380.*

This book is noticed in this department only because it has a "trial scene" that is indelibly written, dramatic and disturbing. The story itself is British, provocative, perhaps shocking to many readers; but it is told with the swiftness of pace and a sanity of outlook that remove offense from most unpalatable incidents. The setting is England and Burma during World War II, when uniforms and races were thrown into new juxtapositions in small towns.

Nevil Shute is an aeronautical engineer who was a Commander in the Royal Navy and has won the highest technical distinction that British aviation awards. He was also in Calcutta and Burma as a correspondent. This is his fourth novel to be chosen by a major book club; it may soon become one of the most controversial volumes in bookshop windows.

In this department we deal only with the trial scene in *Rex* v. *Brent* (pages 307-329). Corporal Brent of the Parachute Regiment was charged with murder. He was defended by a Major Carter. Brent had been in a "pub" with a young woman. Seddons, the deceased, had made insulting remarks about the young woman and, through ignorance, about the maroon beret which Brent wore. An altercation on the sidewalk followed; Seddons kicked Brent, and Brent killed Seddons with his bare hands. The prosecution's case was clear and conclusive.

Then Carter put in his case. Brent had joined the Army at the age of 17, a callow and utterly untrained youth. He was taught first to kill men with the rifle, then with bayonets, then with grenades and flame-throwers, then with the Sten gun and the beer bottle that exploded. At the top of his platoon after three years in the art of killing men, he volunteered for the Commandos, and was taught first the knack of killing men quietly with knives—Major Carter was his instructor—Carter and the Commandos wore the same maroon beret. Then followed schooling in Unarmed Combat—at twenty Brent had been taught how to kill men with his hands and feet, for the King.

No one ever taught him boxing or the arts of self-defense; for four years he learned only how to kill other men, and finally, without weapons. When the bulky and powerful Seddons angered and kicked him, Brent used the only methods his country had taught him. What with others would have been a lamentable brawl, with a bloody nose or two and a blackened eye, ended in a quick killing.

"For many months, by the delegated order of the King executed through his officers," said Carter in summation, "this immature young man has learned these deadly crafts. I and others taught him to kill without having or taking the time to think. The accident of war has taught this young man to do certain things by instinct. If I and others had taught him such things in peacetime, we would share guilt with him. Are we to say that the Crown throws a cloak of immunity around myself but leaves Corporal Brent unprotected to face a trial for murder, for doing what we have taught him to do by instinct and without thought?"

The developments of the trial are well told. The judge's charge left the door open for a verdict of manslaughter. The jury so found. Brent was sentenced to six years of penal servitude. The gifted Carter dropped with his parachute party at Arnhem and held out at the bridgehead for several days. After being taken prisoner, he was shot while trying to escape. The whole episode of the trial drives home the especial responsibility of the Courts and the Bar, so earnestly pointed out by

Chief Justice Bolitha J. Laws in our March issue (page 254) in cases where veterans are accused of crimes. World War II has left causations and responsibilities unknown to conventional penology.

W. L. R.

SPENDTHRIFT TRUSTS. *Under the New York Statute and Elsewhere—Including Insurance Proceeds. By Erwin N. Griswold. Albany: Matthew Bender and Company. New York: Prentice-Hall, Inc. February, 1947. $12.50. Pages xxxvi, 767.*

The second edition of this work by the gifted Dean of the Harvard Law School appears after eleven years, during which it has become standard and authoritative. As the number of cases in the field have about doubled and the statutory developments in a number of States have had significant effects, the new edition is a complete revision, to keep abreast of the decisional law and the enactments.

It was said in the Preface to the first edition, and remains true, that "A large proportion of all trusts today are spendthrift trusts"; but Dean Griswold thinks there has been a growing recognition of the practical rather than logical bases, of spendthrift trusts, with increasing recognition, both by statute and decision, of the fact that "spendthrift trusts can be justified only when limited and adjusted to take into account the many factors which bear on the problem".

The revised work has grown in authority and precision, and will add to the author's stature and repute. As before, he expresses his great debt to his colleague, Professor Austin W. Scott; and the text bears evidence that many of the problems have been threshed out with him, so as to be four-square with his clear thinking. In accordance with its practice, this department does not undertake more detailed or critical review of a revised edition of a book which has been accepted by the profession as "a useful tool of the trade".

INTERNATIONAL CONTRACTS AND THE ANTI-TRUST LAWS. *By Harry A. Toulmin, Jr., J.D., Litt.D., LL.D. Introduction by U. S. Senator Homer Ferguson. Cincinnati: The W. H. Anderson Company. $15. Pages 1090.*

As the Supreme Court of the United States has made clear as recently as *New York* v. *United States* (326 U. S. 572) and as the JOURNAL has from time to time pointed out (e. g., March issue; page 282), the time has come in America when our lawyers need to familiarize themselves with international and foreign law as well as our own domestic law. The export of American products into foreign markets, the importing of goods of foreign manufacture, the contracts with nationals of other lands, the relationships to cartels and competitors in foreign markets, etc., are subject in various respects to statutes of the United States, including the Anti-Trust Laws, and may need to take into account international law and the law of other countries in which transactions are carried on. For determining a safe course in such matters, particularly in drafting of international contracts in such a manner as to avoid complications, Mr. Toulmin, member of our Association since 1923, has again produced a work useful for practitioners.

Strange things are coming to pass in our time. With the review copy of this book came the mimeographed sheets of the publisher's advance notice about it, headed "This International Era". We thought some misplacement had occurred. Actions of the House of Delegates and articles in the JOURNAL were quoted three times. The creation of the JOURNAL's new department, "The Development of International Law" (33 A.B.A.J. 282; March, 1947) was referred to as a "most significant straw in the wind", as to what the new international relationships will require of many lawyers. As the *United States News* said on March 28, this country is truly "up to its ears" in the world.

Senator Homer Ferguson, of Michigan, distinguished jurist and internationalist, member of our Association since 1924, writes an introduction from his extensive experience in international matters involving law. This review could hardly do better than quote for our readers what Senator Ferguson says:

> To these significant questions Mr. Toulmin brings a rich background of many years of experience in the United States and abroad, not only as a private practitioner, but as the official representative of the United States Government. His reflections are therefore not those of academician but embody the results of close observation of international private agreements in actual operation. . . .
>
> However, Mr. Toulmin, on the basis of the network of private agreements concluded over the last half-century, has sought to weave a pattern not only of the legal and illegal features of such agreements from the standpoint of what the courts may have condoned or found objectionable, but also of their desirability from the standpoint of the public interest of the United States. Here the author speaks not merely as a lawyer, but as a statesman; for commercial morality, international economics and the interest of national defense are all bound up together. As he so appropriately points out, there would be less need for congressional investigation of those who have entered into agreements of this character, had they not failed to take into account "the effects of the contracts upon the economy and defense interests of this country."

Colonel Toulmin's admonitory list of eighteen factors, deemed by him to be vital in connection with the prudent negotiation and drafting of an international contract between non-governmental concerns, will be helpful to lawyers who have to struggle with such matters.

WITH INTENT TO DECEIVE. *By Manning Coles. Garden City, New York: Doubleday and Co. (The Crime Club). 1947. $2.00. Pages 282.*

One of the better numbers in the current crop of mystery thrillers brings the ubiquitous Tommy Ham-

bledon into his first post-war adventure, in a London scene and a background of international intrigue, double identity, large scale larceny and murder, that involves South and North America as well. Chief Inspector Bagshott works through the intricacies of police procedure, which is especially well depicted.

RUSSIAN-AMERICAN TRADE.

A Study of the Soviet Foreign-Trade Monopoly. By Mikhail V. Condoide. Columbus, Ohio: Bureau of Business Research, College of Commerce and Administration, Ohio State University. 1947. $2.50. Pages xiii, 160.

This timely and objective study gives in a concise form the history of the trade relations between the United States and Russia, with emphasis particularly upon the impacts of the political, economic and social changes in Russia during and after World War I, on the place of foreign trade in the total Soviet economic plan for expansion, and on the implications of the Soviet foreign-trade monopoly or "state cartels" as means of commerce and economic warfare. The statistics and facts as to these matters have been little known: Those available appear to have been brought together in this volume. They are competently analyzed, but no particular thesis about them is maintained.

NAVY TRIALS DIGEST.

By Richard S. Bishop and H. H. Brandenberg. Los Angeles: Wolfer Printing Company. 1947. $6.15 (including California sales tax). Pages 206.

At a time of active interest in improving the quality and modernizing the procedures of military and naval justice, Richard S. Bishop, of the San Francisco Bar, and H. H. Brandenberg, of the Los Angeles Bar, have rendered a useful service in making a good start toward bringing together in a compact form, patterned after the conventional digest familiar in civilian practice, the body of law applied in the court-martial system of the United States Navy as contained in its Court Martial Orders from 1916 through VJ Day.

All of the case law of Navy Court-Martial is embodied in the Orders which are issued regularly by the Judge Advocate General of the Navy. From 1916 through 1937 they were bound in two large volumes; since then, there has been an annual pamphlet, each duly indexed, but with no cumulative index. Search for a case or rule on a given point has been tedious and baffling; the experience has been common that the quality of naval justice would have been much improved if the Court-Martial Orders had been more readily available to the officers assigned to duty on or with Navy Courts-Martial. Errors sometimes made were not due to intentionally wrong advice or to indifference or neglect in research. Often the individual had access to neither the bound volumes nor the pamphlets; but if he obtained such access, his difficulties and labors began at that point.

This book is a creditable private project designed to make a beginning in supplying that need. It is written for Navy lawyers, by men who have been such; but others will find its source material informative. It has been prepared to give precedents or probable points as to the nature and elements of offenses, the charge and specifications, the trial and review, etc. Summary court-martial offenses have been classified under the corresponding offenses for general courts-martial. No attempt is made to give all of the rulings that have followed the original precedents.

In design, arrangement and detail, the volume has faults which its authors freely confess, but their work is nevertheless a substantial contribution to naval justice. Inevitably, it takes no account of the reforms or changes which the Navy has itself developed, or those which may be made by the Congress, in the light of the recommendations made by the Advisory Committee as to Military Justice.

A WIDER ARC.

By Melville Cane. New York: Harcourt, Brace and Company. April, 1947. $3.50. Pages 186.

A working lawyer who has been, all his life, a proficient and acclaimed poet, has added *A Wider Arc* to his volumes of published verse. Born in Plattsburg, New York, in 1879, graduated from Columbia and its Law School, admitted to the New York Bar in 1903, he has specialized in the prosaic tasks of copyright law and its allied fields as a member since 1905 of the law firm which is now Ernst, Cane and Berner, in New York City. He has been interested in the State Bar Association and the Association of the Bar of the City of New York, and in 1933 received the Columbia University award for conspicuous alumni service.

From his college days he has written verse of many types. Much of it has been published in the leading literary magazines and many of the anthologies, and has been acclaimed by critics as accomplished, deft, fluent in expression, definitely original, and oftentimes ascending to the plane of true poetry, perhaps in the Emily Dickinson tradition—emotions sharpened into joy or pain by unexpected glimpses of beauty or sordidness—"the climate of the heart". His published works include *January Garden* (1926), *Behind Dark Spaces* (1930), *Poems; New and Selected* (1938).

His present volume contains verse both serious and light, written during the past twenty-four years or more, not hitherto put in book form. His serious lines have beauty as well as precision and grace in meter; his light verse has subtlety of humor and often a sharp thrust at foibles and follies of our time. He includes a prose piece, "Making a Poem", that will delight amateur versifiers. But this lawyer's own verse has the swift, sure craftsmanship of the artist and authentic muse.

THE INDIVIDUAL, THE STATE, AND WORLD GOVERNMENT. *By A. C. Ewing. New York: The Macmillan Company. 1947. $4.00. Pages viii, 322.*

> Individualism versus totalitarianism, democracy versus dictatorship, nationalism versus internationalism, and militarism versus pacifism, are antitheses which have written themselves in blood and tears across the world to-day. Has the philosopher as such anything to say about these bitter questions?

That is the challenging query with which the introductory chapter of this book begins. The author himself is quite modest about the possibilities of philosophy. He thinks political philosophy in the main is a branch of ethics, and he acknowledges that

> . . . a person can assuredly know what he ought to do without being a philosopher, because he may well have clear moral insight in a particular case without being able to give the ultimate principles by which his decision is justified. But, it does not follow that the philosopher may not in difficult cases *help* one to see what ought to be done by referring to ultimate principles.

His statement of the function of philosophy can hardly be controverted:

> It seems to me that the function of the philosopher in practical ethical questions is advisory; he can put new and illuminating points of view, he can state in general the main principles on which the decision should be based, he can help by asking the right questions, he can list the values which have to be taken into account, he can remove confusions which make bad arguments seem good, he can help to sort out the relevant from the irrelevant factors, and he can show which view can best be fitted into a coherent system of ethical principles.

It is to be hoped that the popular disdain of philosophy, the impatience of the modern mind with everything except quick and absolute judgments, will not forestall the diligent consideration which this book merits. It embodies the kind of thinking that we sorely need. Practical experience with the affairs of life supports the observation of A. N. Whitehead, whom the author quotes:

> There can be no successful democratic society till general education conveys a philosophic outlook.

The very processes of democracy create attitudes that are inimical to good government. Tolerance for opinion and freedom of expression create the impression that all opinions and expressions are equally good. As a result there is terrible confusion. Statements become current which are absolutely false, and half-truths, the meanest kind of lies, are accepted as absolute verity—and all this at a most critical period of human history when there is greatest need to know exactly what we are talking about.

We are all prone to accept the blunders and inefficiency of democracy as the only alternative to despotism. Those who feel distressed—and there are many—for the fate of democracy and our civilization, sense a deep need for a re-examination of many current concepts and a clarification of public opinion regarding many principles. Here is a book that can serve that purpose if its profound and thorough analysis can be passed on to the public through forum, schools, and press.

The value of the book does not depend on a philosophic attitude. It makes a contribution which a very practical mind can accept and use. The chapter headings indicate this:

II. The Rights of the Individual.
III. Democracy.
IV. The Concept of the State.
V. International Government and the Prevention of War.

Nothing is more needed today than such a consideration of rights as is contained in Chapter II. Most of our controversies and conflicts, our strikes and our wars, arise from our differences regarding *rights*. What are rights? What is their inherent nature? How are they created? Enforced? What are their limitations? This book dispels the illusion as to *sacred* or *absolute* rights. It shows that rights are correlative, and must be balanced one against another. It also shows that they are all subject and subordinate to the interests of the community. Not because of some legislative enactment, constitutional provision, or judicial decree, but because of man's very nature as a social being. How our differences dissolve when we consider our common interests! "The general principle" which the author adopts is this:

> . . . rights of the individual to control his own life should be respected as much as possible, alleged rights to control the lives of others should be admitted as little as may be.

Chapter III begins with this observation:

> At the moment the strongest argument for the form of government we call democracy is Hitler. I mean that the main alternative which has recently flourished in the world is so completely anti-ethical and disastrous in its nature that the advocate of parliamentary government, or as we are apt to call it now, democracy, has his task immensely simplified by being able to point to recent examples of the terrible evils which existed in those highly developed states that had deserted democracy. His task is, therefore, much easier than it was twenty years ago when people knew by experience the defects of representative parliamentary institutions but did not know so well the defects of other forms of government or had partly forgotten what they knew of them.

The author weighs the arguments for and against democracy. The three great advantages of the democratic form of government are:

(1) It is the nearest possible approach to government by consent;

(2) It is the only form of government in which all classes, interests, and points of views are represented;

(3) The political liberty which is enjoyed under such a government has a beneficial effect on character and is in some respects a valuable education.

The principal argument against democracy he states in these terms:

> Democracy means government in which everybody has a share. But government is a highly specialized and difficult science, and most people have neither the leisure, nor the inclination, nor the special knowledge and ability to become masters of this science any more than they are capable of being, say, masters of the science

of medicine. Therefore democracy means government by the unskilled; and this may be held to be as unreasonable as if the proper medical treatment for a given disease were fixed by a general vote in which the doctors had no more voting power than anybody else. For is not a whole state with all its interests an even more complicated thing and one even more difficult to handle than a human body, and therefore requiring even more special knowledge and skill? In ancient times it was Plato's chief charge against democracy that it thought everybody had a right to a political opinion and took no account of the need for special training, knowledge and skill; and there has been in recent years no lack of men who pressed the claims of government by experts as opposed to government by the people, though this is not the main argument on which anti-democratic governments that we have fought based their case, I think it is the most formidable argument with which the defender of democracy has to deal.

The limitations and defects of democratic government must be acknowledged and avoided if it is to prevail against other forms, and if it is to arrest the inherent tendency of popular government to become ochlocracy. As John Ruskin observed:

> No nation can last which has made a mob of itself, however generous at heart.

In Chapter IV it is contended that

> . . . no airtight definition of "state" is possible, since the criteria which distinguish states from other societies are various.

By the word "state" the author understands

> . . . merely a group of individuals as politically organized, and by "actions of a state" actions by individuals on behalf of this group.

The Nuremberg trial, which took place after the writing of this book but prior to its publication, supports the author's view.

It follows quite naturally that "principles which govern individual ethics can be applied to the state". The author sees no reason to deify the state or to make of it a superperson. Rights of the state, like those of the individual, are subordinate to the community interest. He quotes McIver:

> It [the state] commands only because it serves; it owns only because it owes. It creates rights not as the lordly dispenser of gifts, but as the agent of society for the creation of rights. The servant is not greater than his master. As other rights are relative to function and are recognized as limited by it, so too the rights of the state *should* be.

The author concludes:

> . . . one thing at least has emerged from the considerations of this chapter, namely, that the notions of absolute sovereignty and of absolute obligation to the state over-riding all other obligations are mere fetishes and there is no objection on principle even to a federation of the whole world.

Chapter V on International Government begins thus:

> It is obvious that no book on political philosophy can now afford to neglect the problem of this chapter. It is indeed the problem *par excellence* of the present day, and on its tolerably successful solution depends the solution of all other problems.

Just as the author considered the distinctive attribute of the state to be "ultimate arbiter and regulator of claims", because "there must always be some organized means of deciding disputes", so it seems to him

> . . . a paramount duty of all states to work for the establishment of an international government which would do for conflicts of states what the national state does for conflicts of individuals and societies within the state.

The author admits that the sentiment of nationality is not old in history and can not be rationalized, but he would not submerge it entirely in a world state:

> . . . the sentiment probably has a strongly beneficial effect on the cultural life of the people. It would therefore not be desirable to suppress it altogether in the interests of internationalism, even if that were possible.

But when nationalism insists on absolute independence and sovereignty, the author considers such assertion both immoral and impossible. This chapter gives a great deal of discussion to Germany—too much, it seems now. The author himself observes that

> there is a real danger in thinking that the solution of the German problem would necessarily remove the peril of war.

He admits that

> even with Germany and Japan out of the running, there may arise between nations issues which both sides think too vital for surrender.

He therefore considers it of

> great importance to see that there are available means of settling disputes which can take the place of war.

But he adds:

> The danger of war is not, however, the only circumstance which calls for some form of international government; and there can be no doubt that every nation would be much bettered economically, and that many causes which might possibly lead eventually to war would be removed, if there were an effective system of international control in economic matters.

ROBERT N. WILKIN

Cleveland, Ohio

Previews

■ Duell, Sloan and Pearce (New York) will publish on May 21 *20th Century Congress,* by Representative Estes Kefauver, of Tennessee, and Dr. Jack Levin. It is in the field of which Walter P. Armstrong writes, elsewhere in this issue. Bernard M. Baruch says the discussion is "simple and direct" and "very much needed", as an expert study of legislative machinery and needed changes. The book will be reviewed in our June issue.

A book which will be of marked interest to American lawyers will be *Eternal Lawyer: A Legal Biography of Cicero.* The gifted author is Judge Robert N. Wilkin, of the United States District Court for the Northern District of Ohio, member of the JOURNAL's Advisory Board and contributor of book reviews in this and other issues. As one of America's foremost legal scholars, Judge Wilkin has doubtless written a most readable portrayal of the great lawyer of Roman history. The book will be reviewed in our June issue.

Taxation for Prosperity, by Randolph E. Paul, former General Counsel of the Treasury Department, will be published by Bobbs-Merrill about May 1.

Lawyers *in the News*

William Edwards STEVENSON

▪ On May 3 and 4 a metropolitan lawyer who at the age of 46 has left a lucrative practice and an enviable place in the profession and in public activities will be formally inaugurated as President of Oberlin College, a renowned small college of the highest standards, in Lorain County, Ohio, on the western fringe of Greater Cleveland. He succeeds Dr. Ernest Hatch Wilkins, who retires after serving since 1926.

It is indeed a sign of changing times that Oberlin chose a New York lawyer as its eighth president. With one exception his predecessors have all been clergymen and religious philosophers. Significant also is this lawyer's deep conviction that the sound education of young people in the fundamentals of the American form of government and concepts of law-governed freedom has become more important than anything else he could do with his gifted life. He has strong convictions as to the dignity and worth of the human soul and the individual life, and has perceived that all law, education and government needs to be grounded deep in the inviolability of God-given human rights. He is profoundly concerned that the young men and women who come up for the professions and for leadership in our country shall have been soundly taught in college.

STEVENSON has had a lively and amazing career. Born in Chicago, this direct descendant of Jonathan Edwards was the son of an Indianapolis mother and a distinguished Presbyterian clergyman, who was President of the Princeton Theological Seminary during 1914-36. Young STEVENSON went to Andover and then to Princeton University, enlisted in the Marine Corps in 1918 at the age of 18, was graduated from Princeton in 1922 as Chairman of the Senior Council, and was Rhodes Scholar from New Jersey at Baliol College, Oxford, in 1922-25. At Princeton, he was a noted track athlete and was American and British champion in the 440-yard dash, and ran in the 1924 Olympics in Paris as a member of the 1600-yard relay team which set a new world record. In 1921 he was on the Princeton-Cornell team for which he won the quarter-mile against Oxford and Cambridge. In 1925 he won the quarter-mile for Oxford-Cambridge against Princeton-Cornell.

Admitted to the New York Bar, he was an assistant U. S. Attorney under Emory R. Buckner, assisted in several investigations, was associated with the law firm headed by John W. Davis, and in 1931 formed his own law firm with Eli Whitney Debevoise. This firm succeeded from the start and Stevenson was a dynamic member, who made time also for leadership and trusteeships in many activities, including hospitals, universities, schools, the Boys' Athletic League, the Big Brother Movement, etc. He became a member of our Association in 1931.

When World War II brought its blight, STEVENSON was too old to need to go, too old for combat duty if he did, too young in years and spirit not to want to do whatever he could do best. A uniform with oak leaves on his shoulders and a shiny desk in Washington had no appeal for him. He found that the Red Cross needed a man in England, where he had spent three years. So he and his wife went. The team of "Billy and Bumpy" worked through the dangers, in England, Algiers, North Africa, Sicily, and Italy. The late Ernie Pyle was fascinated with what they did for soldiers; he devoted three of his columns to them. "He has been successful because he is smart and because he is honest in the deepest meaning of the word", wrote Pyle.

"The world is in a pretty messy state of affairs", said Stevenson not long ago, "and it is my belief that education will play an important part in the big job of getting things straightened out again". Education *for* law and leadership seems to him as essential as education *in* law. As head of one of the most militant and independent of the colleges, this tall, robust, inspiring leader of men will be a valiant ally and co-worker of our Association—a fighting force in and for the future of America.

Helen NEWMAN

▪ By an order entered by the Supreme Court of the United States on March 31, Miss HELEN NEWMAN, a member of our Association since 1935, for the past five years Assistant Librarian, was appointed the Librarian of the Court to succeed the late Oscar D. Clarke, who died on February 22, after serving as Librarian since 1915.

Miss NEWMAN is well known to many lawyers and law school teachers

through her editorship from 1934 to 1942 of the *Law Library Journal*, the official publication of the American Association of Law Libraries. She is a native of Washington, D. C., and worked her way through the George Washington Law School of that city as a student librarian. She received the degrees of LL.B and LL.M. She was the secretary of that Law School from 1925 to 1932 and its law librarian from 1927 until 1942, when she was brought to the Supreme Court by the late Chief Justice Harlan F. Stone.

She is a member of the American, District of Columbia and Federal Bar Associations, the Order of the Coif, Delta Sigma Rho (honorary debating society), Chi Omega sorority and Kappa Beta Pi (legal sorority). She is a member also of the Law Librarians' Society of Washington, of which she is a past president, and of the American Association of Law Libraries.

Miss NEWMAN was a member of the American Bar Association's Committee on Facilities of the Law Library of Congress in 1940-1941.

The Supreme Court Library is known to judges and lawyers as being a splendid working collection of Anglo-American law books, periodicals and legal materials. It contains about 150,000 volumes, which are available to the members of the Bar of the Court as well as to the Justices. The Library includes the valuable Elbridge Gerry collection, presented to the Court by Senator Peter Gerry, containing the English Year Books and other rare folios. The huge resources of the Law Library of Congress are also available to its users, through a message service system. The reading room, finished in white oak with hand-carved ornamentation, contains several exhibit cases which display interesting original manuscripts and rare editions. Miss NEWMAN and her assistants are engaged on a bibliography of material relating to each Supreme Court Justice since the Court was constituted in 1790.

Louis
St. Stephen
ST. LAURENT

■ If one were to try to analyze and ascribe reasons why Canada has risen steadily in prestige and solid influence during World War II, the deliberations of the Committee of Jurists and the San Francisco Conference in 1945, and the work of The United Nations ever since, a great deal of the credit would go to one of Canada's foremost lawyers, who as Minister of Justice was a conspicuous figure in the great Conference and in the General Assembly of The United Nations, and is now the Dominion's first full-time Minister of External Affairs (corresponding to the Secretary of State of the United States).

ST. LAURENT has taken an active part in the Canadian Bar Association, and has shown great interest in the work of what is now the American Bar Association's Committee for Peace and Law Through United Nations, in conjunction with the similar Committee of the Canadian Association. He attended and addressed the Annual Meeting of our Association at Chicago in 1930.

ST. LAURENT grew up in the Eastern townships of Quebec, where two-thirds of the population in those years was English. His mother was Irish and his father French; he speaks both English and French with a resonant but modulated eloquence. More than any other Canadian, he is the spiritual heir of Sir Wilfred Laurier, great Liberal Prime Minister. His origins and his schooling in the traditions and the way of living of both of Canada's basic populations have enabled him to contribute mightily to a sense of nationhood and unity against many obstacles, during war and in peace.

During thirty-six years in the practice of law, he rose to front rank. Called to Ottawa five years ago by Prime Minister Mackenzie King, he has since been away only ten days on personal holidays. In the Dominion's House of Commons as Minister of Justice, he seemed easily the most popular member on the floor, trusted by all parties, races and factions. It is no secret that he has wished to return to his leadership at the Bar; but, as Canada's part in world affairs became more extensive and crucial, he took over as Minister of External Affairs, an office hitherto held by the Prime Minister himself.

On the brass plate on the door of his office, off a shadowed terrace of a pillared court looking toward the East Block and the stately Peace Tower in the noble row of edifices on Ottawa's Parliament Hill, the legend now says: "Secretary of External Affairs". He believes that provincialism is vanishing in Canada and that the Dominion can be a great factor for peace and law in the troubled world. If this proves to be increasingly true, one of the basic reasons will be the skill of this tall, courtly, grey-haired lawyer, learned in both the civil and the Anglo-Saxon law, exemplar of the rich heritage of two races and tongues which are struggling with the post-war problems of dynamic Canada.

John
Kirkland
CLARK

■ Members of the profession of law throughout the country, including his many friends in the House of Delegates and our Association, will regret the retirement of JOHN KIRKLAND CLARK from membership in the

New York State Board of Law Examiners, after twenty-six years of diligent and capable service. During his tenure in office, he has helped to raise and maintain the standards of education and admission in New York, so that the State ranks high among those adhering to the most exacting standards of preparation and admission. Recognizing the relationship of the economic condition of the Bar to the requirements for admission as to the maintenance of high standards of professional ethics, CLARK has pioneered also, in our Association and in State and local Associations, in trying to find out the facts as to the earnings and financial status of lawyers and in proposing remedial steps.

CLARK was born in Springfield, Massachusetts, in 1877. He was graduated from Yale in 1899, and then *cum laude* from the Harvard Law School in 1902. His professional career has included public service in many capacities, including first the post of Assistant District Attorney under the late Charles S. Whitman. He has been lecturer at the Harvard Law School on New York practice.

In our Association he has been one of its indefatigible members since 1917, and was Chairman of the Section of Legal Education in 1931-34. He has been a member of the House of Delegates since it was created in 1936, and has been one of its most vigilant and colorful members. No one else in the House has followed as closely and consistently, over the years, every detail of the wording as well as the substance of proposed action.

CLARK's retirement from the State Board of Law Examiners will enable him to give more time to his law practice and to the work of our Association and profession, at whose hands he has long deserved well. CLARK's retirement was automatic by virtue of regrettable rigidity in the State's Civil Service Law. The New York Court of Appeals has named as his successor, John A. Blake, of Bronxville, a member of the faculty of the Fordham University Law School.

Robert M. BENJAMIN

Frances Craighead DWYER

■ A member of our Association has been appointed by Chancellor William J. Wallins of the Board of Regents of the State of New York, as a member of the Committee to conduct hearings in disciplinary proceedings involving professional persons who are under the jurisdiction of the Board of Regents as to their conduct.

The Committee's duty is to hear and review the recommendations of the State professional boards which act in first instance in matters connected with the discipline of practitioners in various professions. The professional conduct of lawyers is in the charge of the Courts rather than professional boards and the Board of Regents. The findings of the Committee are presented to the latter board.

BENJAMIN was graduated from the Harvard Law School in 1922 and served for a year as secretary to the late Mr. Justice Holmes. He is a member of the law firm of Spence, Hotchkiss, Parker and Duryea, in New York City, and has given special attention to administrative law. In 1939, by appointment of Governor Herbert H. Lehman, he investigated the exercise of quasi-judicial functions by State boards and departments, and made a notable report. At times he worked with members of our Association's Committee who were perfecting the draft of the Administrative Procedure Act. Elsewhere in the issue, John Dickinson quotes his views on the subject of judicial review of administrative agency findings. BENJAMIN has been a member of our Association since 1927.

■ There seemed to be a lot of doubt in Georgia for many weeks as to whom had been elected Governor, but there was no doubt in the choice of Atlanta's Woman of the Year in the Professions for 1946. That award was unanimously and enthusiastically bestowed on a member of our Association who is general counsel for the Legal Aid Society, a member of the Executive Committee of the National Association of Legal Aid Organizations, and Chairman of the Legal Aid Committee in the Georgia Bar Association.

Mrs. DWYER was born in Hot Springs, Arkansas; her family moved to Atlanta when she was five years old. She attended public schools in Atlanta, won her A.B. degree from Agnes Scott College, her M.A. degree from the University of Michigan, and her degree in law from Emory University. It is said that her decision to become a lawyer was made while she was in grammar school.

Her father, Edgar Craighead, is a lawyer; her mother practised law for many years; her husband, Francis Dwyer, is a lawyer, now serving as vice president of a life insurance company. Mrs. DWYER is in the general practice of law, as a member of the firm headed by her father.

In addition to her effective work for Legal Aid, she is Vice President of the Georgia Citizenship Council, to which she was appointed by Governor Arnall. She is said to have been a large factor in bringing about the 1946 enactment of a Child Labor Law in Georgia.

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Review of Recent Supreme Court Decisions

by Edgar Bronson Tolman*

Bankruptcy.

Priority of Claims—Full Faith and Credit

Morris v. *Jones*, 91 L. ed. Adv. Ops. 399, 67 Sup. Ct. Rep. 858; U. S. Law Week 4165 (No. 62, decided January 20, 1947).

Chicago Lloyds, an unincorporated association, was authorized by the State of Illinois to transact an insurance business in Illinois and other States. It qualified to do business in Missouri. In 1934 petitioner sued Chicago Lloyds in a Missouri court for malicious prosecution and false arrest. In 1938, before judgment was obtained in Missouri, respondent's predecessor was appointed by an Illinois court as statutory liquidator for Chicago Lloyds. The Illinois court fixed a time for the filing of claims against Chicago Lloyds and issued an order staying suits against it. Petitioner had notice of the stay order but nevertheless continued to prosecute the Missouri suit. At the instance of the liquidator, however, counsel for Chicago Lloyds withdrew from the suit and did not defend it, stating to the Missouri court that the Illinois liquidation proceedings had vested all the property of Chicago Lloyds in the liquidator. Thereafter petitioner obtained a judgment in the Missouri court and filed an exemplified copy of it as proof of his claim in the Illinois proceedings. An order disallowing the claim was sustained by the Illinois Supreme Court against the contention that its allowance was required by the Full Faith and Credit Clause. 391 Ill. 492, 63 N. E. 2nd 479.

On certiorari the Supreme Court held, that the judgment of the Missouri court, having jurisdiction of the parties and the subject matter, operated as *res judicata* even if obtained upon a default, and is entitled to full faith and credit in Illinois, even though after the liquidator had been appointed, the underlying claim could not have been maintained in Illinois. The Missouri judgment may not be defeated by virtue of the fact that under other circumstances the petitioner might not have been able to obtain it in Missouri, or to have received any benefit from it there, as for example, if a liquidator had been appointed for the debtor in Missouri prior to the judgment. Moreover, the question whether the judgment is entitled to full faith and credit does not depend on the presence of reciprocal engagements between the states. The notion that the control over the proof of claim is necessary for the protection of the exclusive jurisdiction of the court over the property is a mistaken one. The appointment of a liquidator for Chicago Lloyds did not operate as an abatement of the Missouri suit, and there was no more reason for discharging the liquidator from the responsibility for defending a pending action there than there is for relieving a receiver of that task.

The nature and amount of the petitioner's claim may not therefore be challenged or retried in Illinois proceedings.

Justices FRANKFURTER, BLACK and RUTLEDGE dissenting, held in substance that the State of Illinois may provide that when an insurance concern to which Illinois has given life, is by the judgment of the state courts no longer to be allowed to conduct insurance business in Illinois, the state may take over the local assets of such insurance concern for fair distribution among all who hold claims against it, and announce in advance as a rule of fairness that all claims not previously reduced to valid judgment, no matter how or where they arose, if they are to be paid out of assets thus administered by the State, must be proved on their merits to the satisfaction of Illinois.

The Full Faith and Credit Clause does not require a State to give an advantage to persons dwelling without, and state policy may justifiedly restrict its own citizens to a particular procedure in proving claims against a state fund. Since no citizen of Illinois could obtain such a judgment in the Illinois courts, the judgment obtained in Missouri by Mor-

* Assisted by James L. Homire, E. J. Dimock, Nathan S. Blumberg and Edmund Ruffin Beckwith.

ris, a citizen of Missouri, cannot serve as a basis of claim against the Illinois Assets. N. B.

The case was argued by Mr. Ford W. Thompson and J. L. London for Morris and by Mr. Ferre C. Watkins for Director of Insurance, State of Illinois.

Corporate Reorganization

Insurance Group, et al. v. *Denver and Rio Grande Western Railroad Company, et al.*, 91 L. ed. Adv. Ops. 436; 67 Sup. Ct. Rep. 583; U. S. Law Week 4189 (No. 690, decided February 3, 1947.)

The debtor on September 17, 1946 (after the opinion of the Supreme Court filed on July 10, 1946, confirming a plan for reorganization consistently opposed by the debtor), moved in the District Court for a re-examination of the plan in the light of changed conditions since the ICC hearings in May, 1941. (The debtor's petition for rehearing in the Supreme Court was denied October 28, 1946). The changed conditions specified were: "(a) the decline in money rates to a level far below the rates prevailing at these dates; (b) the recent public offering by the Government and purchase by private capital for private operation of the steel plant at Geneva near Provo, Utah, which had been constructed by the Government in the exigencies of war at a cost of in excess of $200,000,000; (c) a permanent elevation of the national income through intensified industrial activity involving for the indefinite future, a greatly increased demand for railway transportation." After a hearing on a motion to dismiss the debtor's petition, the District Court without evidence, dismissed the petition on the ground that the order of confirmation determined the rights of participation and that it did not thereafter have power to reopen the proceedings. It also held that the petition failed to state a case that justified reconsideration.

The Circuit Court of Appeals stayed the execution of the plan on notice of appeal by the debtor. Before the appeal was heard in that court, certiorari under Section 240A of the Judicial Code was granted by the Supreme Court.

Mr. Justice REED delivered the opinion of the Court. He held that both the Supreme Court upon appeal from an order of confirmation in bankruptcy, and the Bankruptcy Court itself after its order of confirmation had been affirmed on review, may take cognizance of subsequent changes and conditions and order the plan re-examined by the ICC. The Court further held that the debtor failed to allege the existence of changed conditions since the decision of June 10, 1946, of a kind not envisaged and considered by the Commission in its deliberations upon or explanations of the plan; that in its decision of June 10, 1946, the Court had held that in this reorganization no changed circumstances up to that date presented by the debtor or other respondents, justified a re-examination of the plan as confirmed. This ruling was binding upon the District Court and the Circuit Court of Appeals as to changed circumstances arising after the order of confirmation and prior to its decision.

Since the same changes in circumstances in the period between the Interstate Commerce Commission hearings in May of 1941, and the decision of the Supreme Court of June 10, 1946, were relied upon by the debtor in its former effort to set aside the District's Court's order of approval and confirmation, and the Court on that review had held that the alleged changes were not of a kind which justified re-examination of the plan, the prior judgment was conclusive and a bar to a petition for re-examination on that ground. Since no allegations were made in this effort for re-examination or before, that the existing cash value of the securities allotted any creditor had ever aggregated the amount of the creditors' claims against the debtor, it could not be contended that the plan was unfair to the debtor or those for whom it was allowed to appear, because of excessive interest. Until it can be shown that the creditors senior to the creditors and stockholders the debtor represents, have received more in value than the face of their claims, the debtor's insistence on re-examination of the plan is without substantial support.

To justify a re-examination into a confirmed railroad reorganization plan, the petition should allege these facts and should also allege any actual sales or values of the securities, showing that the creditors have received through the allotted securities, payments on their claims in excess of their face, and should further allege a radically improved situation with respect to earnings available for the payment of interest. Since June 10, 1946, no significant change in interest rates or earnings available for interest, or in traffic was made to appear.

Mr. Justice FRANKFURTER dissenting, held there was a decisive change in circumstances as a result of the proceedings taken in the enactment of S-1253; that the President did not veto the bill because he disapproved of its purposes, but because it was too weak in some of its provisions for carrying out those purposes; that the statement by leaders of the Conference Committee out of which the vetoed bill came, expressed the hope that the courts and the Commission would take no steps in support or furtherance of pending reorganization plans under Section 77, until the further action by Congress and the President on legislation as recommended by him; that the Court was not to be restricted to the limited specific financial factors relied on by the debtor as affecting the situation since last June, but that since the paramount interest in the case was that of the public, the Court was authorized to review the matter, and on a reconsideration arrive at a new understanding of old facts or hitherto unexplained relevant facts as a change in conditions, without requiring allegation or proof of new events. N. B.

The case was argued by Messrs.

George D. Gibson and Kenneth F. Burgess for Insurance Group Committee; and by Messrs. Frank C. Nicodemus, Jr. and William V. Hodges for Railroad.

Constitutional Law

First and Fourteenth Amendments—Right of a State to Use Taxes to Pay Bus Fares of Children to Parochial Schools

Everson v. *Board of Education*, 91 L. ed. Adv. Ops. 472; 67 Sup. Ct. Rep. 504; U. S. Law Week 4224. (No. 52, decided February 10, 1947).

A New Jersey statute authorizes local school districts to make "rules and contracts" for the transportation of children to schools, including other than public schools excepting private schools operated for profit. The local board of education in this case, acting under the statute, passed a resolution for the transportation of children to public and Catholic schools only. Parents were, by the resolution, to be reimbursed for money spent on bus fares in sending their children to public or Catholic schools. Everson filed suit in a state court challenging the right of the school board to reimburse parents of parochial school students, contending that the New Jersey statute and the resolution thereunder violated the State and Federal Constitutions. The trial court found the statute invalid and the Court of Errors and Appeals reversed, holding that neither the statute nor the resolution was invalid. The Supreme Court on appeal affirmed the decision of the Court of Errors and Appeals. Mr. Justice BLACK delivered the opinion of the Court.

The statute was first attacked by Everson on the grounds of due process, the argument being that a state cannot "tax A to reimburse B for the cost of transporting his children to church schools", because B's sending of his children to a parochial school is a private purpose. As to this argument Mr. Justice BLACK answers that a public purpose will be served by using taxes in this way and the mere fact that a state law, passed to satisfy a public need, coincides with the personal desires of some people is inadequate reason for a declaration that the law is unconstitutional.

The second ground of Everson's attack was that the taxes put to this use constitute support of religion by a State in violation of the First Amendment., i.e., the New Jersey statute is a "law respecting the establishment of religion."

Mr. Justice BLACK traces the development of the First Amendment and, in the light of its developments, declares that it means, among other things, that "No tax in any amount . . . can be levied to support any religious activities or institutions, whatever they may be called, . . .". "But we must not strike that State statute down if it is within the State's constitutional power even though it approaches the verge of that power."

He points out that the First Amendment, as well as being a prohibition against the support of religious institutions by a State, is a prohibition against a State's excluding believers of one sect or another or non-believers from the benefits of "public-welfare legislation *because of their faith or lack of it.*" Mr. Justice BLACK likens this "public-welfare" service to police and fire-protection and comes to the conclusion that general fire protection, for instance, supports church schools no more than this general public welfare service, and yet certainly a State is not prohibited from affording fire protection to a church or church school.

Mr. Justice BLACK declares that the statute here, does no more than "provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools". That, he declares, is not a breach of the wall of separation between Church and State required by the First Amendment.

Mr. Justice JACKSON, with whom Mr. Justice FRANKFURTER joined, delivered a dissenting opinion. He declares that to him the "undertones of the Court's opinion" advocating complete and uncompromising separation of Church from State, "seem utterly discordant with its conclusion . . ." He declares that the court has assumed two deviations from the facts. Pointing to the facts that the school children are not carried in school buses and that the children are only aided if they attend public or Catholic schools, he declares, "In addition to their assuming a type of service that does not exist, the Court also insists that we must close our eyes to a discrimination which does exist . . . certainly the Act does not authorize reimbursement to those who choose any alternative to the public school except Catholic Church schools."

Mr. Justice JACKSON declares that the Church school "is a vital, if not the most vital, part of the Roman Catholic Church . . . Catholic education is the rock on which the whole structure rests and to render aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself." He declares that the beneficiaries of this legislation are selected by an essentially religious test. The ignoring of that fact is the "basic fallacy in the Court's reasoning . . . neither the fireman nor the policeman has to ask before he renders aid 'Is this man . . . identified with the Catholic Church?' But before these school authorities draw a check to reimburse for a student's fare they must ask just that question . . ."

In regard to the "public-welfare" argument of the Court, Mr. Justice JACKSON says, a state "cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character." There are also many evils that result from such a law as this, among them that "If a state may aid these religious schools, it may therefore regulate them." In closing Mr. Justice JACKSON declares "I cannot read the history of the struggle to separate political from ecclesiastical affairs . . . without a con-

viction that the Court today is unconsciously giving the clock's hands a backward turn."

Mr. Justice RUTLEDGE, with whom Mr. Justice FRANKFURTER, Mr. Justice JACKSON, and Mr. Justice BURTON agreed, also delivered a dissenting opinion. Quoting the same passage, from the Act of the Virginia Legislature, passed in 1786 to establish religious freedom, as that quoted in the Court's opinion, he declares, "I cannot believe that the great author of those words, or the men who made them law, could have joined in this decision." He declares that ". . . any law respecting the establishment of religion is forbidden" by the First Amendment.

Mr. Justice RUTLEDGE closes with, "Now as in Madison's day it is" a matter "of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents." T.

The case was argued by Mr. Edward R. Burke and Mr. E. Hilton Jackson for Everson; and by Mr. William H. Speer for Board of Education, et al.

Hatch Act — Government Industrial Worker May Be Barred from Political Activity

United Public Workers of America (C.I.O.) et al, v. *Mitchell et al.,* 91 L. ed. Adv. Ops. 509; 67 Sup. Ct. Rep. 556; U. S. Law Week 4203 (No. 20, decided February 10, 1947).

A labor union of public workers and various of its members brought this action against the United States Civil Service Commission for a declaratory judgment to the effect that the Hatch Act was unconstitutional insofar as it provided in §9(a) thereof "No officer or employee in the executive branch of the Federal Government . . . shall take any active part in political management or in political campaigns." A three-judge court held the provision constitutional and dismissed the complaint. Direct appeal was taken to the Supreme Court. That Court upheld the Act and affirmed the dismissal.

Mr. Justice REED delivered the opinion of the Court. He discusses four questions: (1) whether the docketing of the appeal in the Supreme Court was timely, (2) whether the controversies submitted by plaintiffs other than Poole were cognizable by the Court, (3) whether Poole's controversy was cognizable and (4) whether Poole's activities, admittedly in breach of the Hatch Act provisions, could "without violating the Constitution, be made the basis for disciplinary action." All of the questions except the second were answered in the affirmative.

(1). The appeal was not docketed in the Supreme Court until more than sixty days after it had been allowed. The Act, under which it was taken, provides that the case shall be docketed within sixty days from the time the appeal is allowed, "under such rules as may be prescribed by the proper courts." Rule 11 of the Rules of the Supreme Court provides that, if the appellant fails to docket the case before the return day, the appellee may have it docketed and the appeal dismissed upon producing a certificate of the allowance of the appeal from the clerk of the court below. It further provides that if the appeal is so dismissed appellant may not docket the case and file the record without special leave of the court. Mr. Justice REED states that the sixty-day provision is not a limitation on the power of the Court and that, in the exercise of its discretion, the Court will hear the appeal.

(2). Mr. Justice REED notes that the prohibition of the statute has been violated by none of the plaintiffs except Poole and that there have been no threats of punishment against a named plaintiff, but that appellants want advisory opinions whether they can engage "in political management or in political campaigns". He disposes of the point by saying: "It is beyond the competence of courts to render such a decision."

(3). With respect to Poole, Mr. Justice REED points out that he has been charged by the Commission with political activity and has admitted it and that his removal from office is therefore mandatory under the Act. He states that under such circumstances a declaratory judgment action lies even though constitutional issues are involved.

(4). In upholding the constitutionality of the prohibition, he states: "The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such interference passes beyond the general existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. The regulation of such activities as Poole carried on has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. . . . We cannot say with such a background that these restrictions are unconstitutional."

Mr. Justice FRANKFURTER, in a concurring opinion, disagrees with the decision that the lateness of docketing did not affect the Court's power to hear the case but "under compulsion of the Court's assumption of jurisdiction" reaches the merits and joins in Mr. Justice REED's opinion.

Mr. Justice DOUGLAS, in an opinion dissenting in part, states his belief that not only Poole, but the other plaintiffs, presented an actual controversy within the competence of courts, but he deems a discussion of the constitutionality of their claims immaterial since not reached by the majority. As to Poole, he believes the statute unconstitutional, in view of his position as a mere industrial worker—a roller in the Philadelphia mint—remote from contact with the public or from policy-making.

Mr. Justice BLACK rendered a dissenting opinion, saying: "The sec-

tion of the Act here held valid reduces the constitutionally protected liberty of several million citizens to less than a shadow of its substance. . . . Laudable as its purpose may be, it seems to me to hack at the roots of a Government by the people themselves; and consequently I cannot agree to sustain its validity."

Mr. Justice RUTLEDGE dissented as to Poole for the reasons stated by Mr. Justice BLACK without passing on the constitutional questions raised by the other plaintiffs.

Neither Mr. Justice MURPHY nor Mr. Justice JACKSON participated.

D.

The case was argued by Mr. Lee Pressman for CIO; and by Mr. Ralph F. Fuchs for Mitchell, et al.

Criminal Law

Enforcement of Federal Penal Statutes in State Courts

Testa v. *Katt*, 91 L. ed. Adv. Ops. 776; 67 Sup. Ct. Rep. 810; U. S. Law Week 4351 (No. 431, decided March 10, 1947).

This case involves questions as to the obligations of State Courts to enforce the Emergency Price Control Act.

One Testa, hereinafter called the buyer, purchased from Katt, an automobile dealer, hereinafter called seller, an automobile at a price $210 in excess of the ceiling price fixed under the authority of the Emergency Price Control Act. Section 205 (e) of that Act provides that one who purchases goods at prices in excess of the prescribed ceiling may recover three times the excess paid, plus attorney's fees from the seller in any court of competent jurisdiction. The purchaser brought an action against the seller in a State district court in Rhode Island where he recovered treble damages and costs. The case was taken by appeal to the State Superior Court, where, on trial *de novo* the buyer recovered only the excess and attorney's fees. On appeal to the Supreme Court of Rhode Island that court held that "an action for violation of section 205 (e) could not be maintained in the court of that state," relying on the authority of its prior decision that "a state need not enforce the penal laws of a government which is 'foreign in the international sense'."

The United States Supreme Court took the case on certiorari and reversed the judgment of the state supreme court.

Mr. Justice BLACK delivered the opinion of the Court. The opinion declares that, "whether state courts may decline to enforce federal laws on these grounds is a question of great importance."

The opinion rejects the premise that the Rhode Island court "has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country." The opinion rests on the supremacy clause of the Constitution (Art. VI, Sec. 2) which provides that, "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding;" and declares that the responsibilities of a state to enforce the laws of a sister state are not identical with its responsibilities to enforce federal laws. The opinion reviews prior decisions and concludes that since the Rhode Island courts have jurisdiction to adjudicate the action "they are not free to refuse enforcement of petitioner's claim."

T.

The case was argued by Mr. George T. Washington for Testa and by Mr. Paul M. Segal for Katt.

Federal Procedure

Res Judicata—the Erie Railroad Case

Angel v. *Bullington*, 91 L. ed. Adv. Ops. 557; 67 Sup. Ct. Rep. 657; U. S. Law Week 4247. (No. 31 decided February 17, 1947.)

Bullington, a citizen of Virginia, sold Virginia land to Angel, a citizen of North Carolina, and took Angel's notes in payment of part of the purchase price—secured by deed of trust. Angel defaulted in payment of the notes. Bullington had the trustee sell the land. The proceeds of that sale were applied in part payment of the notes but were insufficient to pay them in full. Bullington then brought suit in the Superior Court of Macon County, North Carolina, for the deficiency. The trial court overruled a demurrer filed by Angel. On Angel's appeal to the Supreme Court of North Carolina that court reversed the judgment below, holding that because of a North Carolina statute the courts of that State were without jurisdiction to consider a claim for deficiency. In that court Bullington had challenged the validity of that statute, insisting that the United States Constitution precluded North Carolina from "shutting the door of its courts to him."

The North Carolina Supreme Court rejected Bullington's argument. It held that "the statute operates upon the adjective law of the State which pertains to the practice and procedure . . . and not upon the substantive law itself. It is a limitation of the jurisdiction of the courts of this State."

Bullington then brought suit in the District Court of the United States for the Western District of North Carolina for the same claim. In the last action there was complete identity of the parties and subject matter. The federal district court gave judgment in favor of Bullington. The Circuit Court of Appeals, Fourth Circuit affirmed. The Supreme Court reversed.

Mr. Justice FRANKFURTER delivered the opinion of the Court. On the basis of the doctrine of *res judicata* it is stated that the judgment of the Supreme Court of North Carolina would bar the suit had it been brought anew in a state court. He declares that for purposes of diversity jurisdiction a federal court is "in effect, only another court of the State".

It is further pointed out that whether the claims are based on a

federal right or on a merely local concern is itself a federal question "on which this court, and not the Supreme Court of North Carolina, has the last say. . . . The decision of the North Carolina Supreme Court concluded an adjudication of a federal question, even though it was not couched in those terms."

As to the jurisdiction of the federal courts in diversity of citizenship cases and the effect of the *Erie R R* case it was pointed out that where federal questions arose in diversity cases the federal law was controlling in both the State and other federal courts. But in non-diversity cases in a federal court "the limitations upon the courts of a State do not control a federal court sitting in the State."

Mr. Justice FRANKFURTER closes his opinion with the following sentences: "The doctrine of *res judicata* reflects the refusal of law to tolerate needless litigation. Litigation is needless if by fair process a controversy has once gone through the courts to conclusion . . . And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties."

Mr. Justice REED filed a dissenting opinion in which Mr. Justice JACKSON joined.

As to the challenged statement that federal courts are State courts under the *Erie* doctrine, Mr. Justice REED says that "They are so far as the enforcement of the substantive laws of the State are concerned, but not when procedure or power to act is involved."

Mr. Justice RUTLEDGE filed a dissenting opinion. He characterizes the prevailing opinion as resorting to an "'and/or' hodge podge of *res judicata* and *Erie* doctrine." He therefore maintains that the doctrine of *res judicata* under the circumstances of this particular case is merely a "rule of judicial administration to be applied . . . as considerations of justice and right application of the policy require, not omitting due regard for its appropriate limits." His thesis is that while *res judicata* is a useful means for putting an end to litigation, that advantage does not always outweigh the policy of showing the truth. T.

The case was argued by Mr. George Lyle Jones for Angel and by Mr. R. Roy Rush for Bullington.

Military Law

Civil Rights—Not Lost by Conscientious Objector under Selective Service Law — *Habeas Corpus* Not Exclusive Remedy for Wrongful Classification by Draft Board

Gibson v. *U. S.*, 91 L. ed. Adv. Ops. 282; 67 Sup. Ct. Rep. 301; U. S. Law Week 4094 (No. 23, decided December 23, 1946).

Dodez v. *U. S.*, 91 L. ed. Adv. Ops. 282; 67 Sup. Ct. Rep. 301; U. S. Law Week 4094 (No. 86, decided December 23, 1946).

In criminal prosecutions in different District Courts for violation of Section 11 of the Selective Service and Training Act both Gibson and Dodez were convicted and on appeal both judgments were affirmed. The Supreme Court granted certiorari and reversed.

Both petitioners are Jehovah's Witnesses and both contended that they were wrongly classified as conscientious objectors rather than as ministers of religion. This defense was excluded on the trials. The Government contended that Dodez had not exhausted his administrative remedies because he had not reported to the camp designated for his assigned "work of national importance", and that Gibson had forfeited his rights by so reporting. These contentions were rested upon different versions of the Regulations which were undergoing repeated amendments by reason of earlier decisions adverted to below. The Government also contended generally that the defense of wrongful classification was inadmissible because no remedy other than the writ of *habeas corpus* was available to either petitioner, on the analogy of persons who even if wrongfully inducted into the armed forces thereby become subject exclusively to military law except for the privilege of the writ.

Mr. Justice RUTLEDGE delivered the opinion of the Court. The opinion holds that when orders were issued by the respective draft boards requiring these petitioners to report to the camps the Selective Service Regulations had been so amended that they differed not only from the Regulations in force when the earlier cases were decided but also from those considered by the trial and appellate courts to be applicable to the instant cases. In view of these amendments, one of which took effect between the dates of the two orders, the Court held that neither petitioner had prejudiced his right of defense by his actions in respect of the administrative process—the one in reporting to camp and the other in not doing so.

Mr. Justice RUTLEDGE rejects the contention that petitioners became subject to military law and thereby lost their civil right of defense in a criminal trial. He points out that under the statute a board's order requiring a conscientious objector to report to a camp designated for such persons merely transfers him from "the jurisdiction" of one branch of a civilian agency (Selective Service) to another branch, and further that such an order involves no physical restraint of the person and no compulsion upon him to obey it other than "the force of the legal command" plus his liability to prosecution. For these reasons the remedy by *habeas corpus* might be uncertain or even entirely unavailable, and unless the defense of wrongful classification could be heard in the criminal proceedings the accused might be deprived of all remedy.

Both judgments were reversed and both cases remanded to the respective District Courts.

Mr. Justice MURPHY concurred in the result. E. B.

The case was argued by Mr. Hayden C. Covington for Gibson and Dodez and by Mr. Irving S. Shapiro for the United States.

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Courts, Departments and Agencies

E. J. Dimock . . EDITOR-IN-CHARGE

Administrative Law . . review of administrative agency's determination of facts limited to consideration of whether there is substantial evidence to sustain its action even though review is by suit.

Trapp v. *Shell Oil Co.*, Texas Supreme Ct., May 15, 1946, rehearing denied, December 31, 1946, Slatton, J., (198 S.W. 2d 424). (See, also, *Thomas* v. *Stanolind Oil & Gas Co.*, 198 S.W. 2d 420).

■ An application to drill an oil well, under an exception to Rule 37 which permits drilling at less than the minimum spacing distances when it is necessary to prevent waste and confiscation of property, had been granted by the Railroad Commission, the agency entrusted with enforcement of the state's oil and gas conservation statutes. The statute (Vernon's Tex. Civ. St. 1936, Art. 6049C, §8) provided that any interested person might "file a suit" to test the validity of such an order. In the suit, additional testimony might be taken. The permit had in the instant case been canceled by the lower courts. Upon appeal, the Supreme Court held that it was faced with a conflict in its prior decisions. In *Gulf Land Co.* v. *Atlantic Refining Co.* (134 Tex. 59, 131 S.W. 2d 73), it had held: "the court does not act as an administrative body to determine whether or not it would have reached the same fact conclusion that the Commission reached, but will consider only whether the action of the Commission in its determination of the facts is reasonably supported by substantial evidence". In the later case of *Marrs* v. *Railroad Commission* (142 Tex. 293, 177 S.W. 2d 941), the Court had said that the statute contemplated a trial and that there could not be a trial "without the right to pass on the credibility of the witnesses and the weight to be given to the evidence." The Court concluded in the instant case that the "substantial evidence" rule announced in the *Gulf-Atlantic* case, *supra*, was the prevailing rule in the State and it held that there was substantial evidence to sustain the action of the Commission in this case. Upon a motion for rehearing, it held that the rule did not violate the State's constitutional provision for a separation of powers. Alexander, C. J., dissenting, was of the opinion that the majority decision was fallacious in its failure to recognize a distinction between the right of the Commission to determine *how* its discretion should be exercised when the facts invoked it, and the right of the courts to determine whether the Commission's order amounted to a confiscation of the vested property rights of one of the parties.

Attorney and Client . . accountant's advice which deals primarily with proper accounting practice is not legal advice though he consulted legal authorities.

Matter of New York County Lawyers Ass'n (Bernard Bercu), New York Supreme Ct., Spec. Term, Pt. I, March 18, 1947, Shientag, J.

■ A firm consulted Bercu, a certified public accountant, upon the question of whether an amount paid to New York City in 1943 in settlement of city sales taxes for the years 1935, 1936 and 1937 could be deducted from 1943 income under the Federal Income Tax Law. The regular accountant for the firm advised that deduction could not be made; Bercu disagreed. To support his opinion, Bercu consulted decisions and departmental rulings, not merely the tax services. He also prepared a memorandum thereon. The Association instituted a proceeding charging that Bercu was engaged in the unlawful practice of law and requesting that he be adjudged in contempt of court. Bercu conceded that he had rendered similar services at other times and that in none of the instances did he audit the books, work on them or prepare the tax returns. Shientag, J., held that the Court had jurisdiction under §750 (7) of the Judiciary Law to punish as criminal contempt out-of-court activities which amounted to the unlawful practice of law. Stating that the right and power to define what constituted unlawful practice of law in New York was vested in the Legislature, Shientag, J., assumed for the purposes of the case that the Penal Law definition was broad enough to cover "any practice of law" by a layman and even went farther and assumed that the courts had inherent power to define what constituted the unlawful practice of law. He held that, even under those assumptions, Bercu's services were not legal services. He said: "Clearly when [the accountant] is pursuing his specialized calling, he has to be in a position to advise clients on matters which may involve the law and which are directly applicable to the work he is called upon to do . . . The question . . . is whether the advice that is given deals

primarily with proper accounting practice under the Income Tax Law . . . Bercu limited his research and his advice to principles of proper accounting, to a study of the tax law, the court decisions and the department rulings on the specific subject . . . ". The association's distinction between the situation where an accountant gives advice in connection with drawing up returns and that where he acts merely in an advisory capacity was said to disregard the realities of the case. The argument that such conduct on the part of accountants was against public policy was characterized as one which should be addressed to the Legislature.

Attorney and Client . . preparation of deeds, deeds of trust, mortgages, and deeds of release by licensed real estate broker is not exempt as preparation of contracts incident to regular course of conducting licensed business.

Commonwealth and Virginia State Bar v. *Jones & Robins, Inc.*, City of Richmond Law and Equity Ct., March 4, 1947, Hudgins, J.

■ Charging that defendant, a corporation licensed to engage in the real estate brokerage business, was practicing law illegally in that it habitually prepared deeds, deeds of trust, mortgages and deeds of release in connection with real estate sales and loans, plaintiffs asked that it be permanently enjoined from engaging in such practices. Defendant admitted the preparation of such instruments, but denied that this constituted the practice of law. Under the rules and regulations of the Supreme Court of Appeals of Virginia, prepared by the judiciary and forty prominent lawyers at the time of the integration of the bar, one is practicing law when ". . . one, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business . . ." (171 Va. xvii). Defendant contended that this definition by implication permitted a realtor to prepare "contracts incident to the regular course" of his business and that the instruments which it prepared were contracts and were incident to the regular course of its business inasmuch as they were prepared in connection with sales it had negotiated as a licensed realtor. The trial judge had upheld defendant's position. His decision was reversed. The Court reviewed extensively the proceedings surrounding the formulation and promulgation of the definition and stated that clearly its main purpose was to protect the public against costly litigation arising from the defective preparation of deeds by laymen. Assuming that the exception in the definition impliedly permitted those acts not expressly forbidden, it held that the contracts in question were not contracts within the exception for they were extraordinary contracts and muniments of title to realty. The Court conceded the force of defendant's argument that it would be illogical to authorize real estate brokers to prepare contracts of sale and leases (which had been previously held to be within the exception), while prohibiting them from preparing the instruments in question, but stated that the line of demarcation had to be drawn somewhere and that the authors of the definition were of the opinion not only that the public welfare did not require the prohibition of the preparation of all legal papers but that such a requirement would be too great a hardship in view of the customs of real estate brokers in the State. Holt, C. J., dissenting, was of the opinion that the decree should be affirmed. As an example of the way businesses and professions overlap and do those things which are ancillary and reasonably necessary to their callings he cited the possibility that "as an incident to the major purpose for which [lawyers] were retained, they might aid [their clients] in finding purchasers [for their lands]." He pointed out, however, that no court, State or Federal, with or without a statute, had ever undertaken to penalize them for doing an unauthorized business as real estate agents. He also pointed out that "The Integrated Bar has some of the indicia of a closed shop."

Attorney and Client . . Massachusetts to consider establishing integrated bar.

■ Upon petition by the Massachusetts Bar Association to establish by rule an integrated bar for the Commonwealth, the Supreme Judicial Court called a hearing at Boston for April 14, 1947.

Bankruptcy . . Court advocates advance announcement by referee, except in clear cases, that allowances for services in summary proceedings will be denied trustee and attorney if proceedings fail . . Court warns that it shall deny such allowances on appeal.

Ford v. *Magee*, C.C.A.2d, February 28, 1947, L. Hand, C. J.

■ As a result of summary proceedings, Magee had been ordered by the referee in bankruptcy to turn back to the trustee $5000 alleged by the trustee to be assets of the bankrupt, but claimed by Magee to have been given him in payment of a debt owed him by the bankrupt. Upon appeal to the District Court, the order had been affirmed. The issue before the Court was whether the trustee had made out a plain enough case to sustain the referee's summary disposition of it or whether it had been established that Magee's claim to the money was substantial so that he had a right to have its merits passed on in a plenary suit. It was held that the claim could not be said to be merely colorable since it was established that Magee had a claim against the bankrupt and there was evidence that the employee, who gave Magee the money, had authority to pay the bankrupt's debts and that he gave it to Magee in payment of the debt. The order was reversed. Speaking for the Court, L. Hand, C. J., said: "The

result is one more illustration of what, one would suppose, had been proved often enough already: *i.e.*, that it is almost always a mistake to seek a conclusion in situations of this sort by the short cut of a summary proceeding . . . In the case at bar there was no justification for taking the chance; the bankrupt was a New York corporation, Magee a citizen of Connecticut; the district court would have had jurisdiction under §24 of the Bankruptcy Act . . . not much time would have been gained, even if the proceeding had succeeded; and now that it has failed, all must be begun again, or the claim must be abandoned. We cannot too insistently urge upon trustees not to proceed in this way; we cannot too seriously impress upon referees the duty of discouraging in every way possible those trustees who do so proceed. An especially effective sanction would be to announce in advance, except in the plainest cases, that if the trustee should fail, neither he nor his attorney will be granted an allowance for their services in the summary proceeding. We shall treat this as warning in advance that in the future we shall feel free upon appeals to deny any such allowance, even though the referee may have granted one."

Criminal Law . . prior to indictment, court has power to entertain motion to suppress confession allegedly obtained in violation of constitutional right.

Fried v. *U. S.*, C.C.A.2d, February 25, 1947. (Digested in 15 U. S. Law Week 2503, March 11, 1947.)

▪ Prior to any grand jury action, defendants petitioned the District Court to order the suppression of confessions alleged to have been illegally obtained. The petition was dismissed, without hearing evidence, on the ground that the court lacked all power, before indictment, to suppress the confessions no matter how illegally obtained. Defendants appealed. In support of the District Court's ruling the Government contended: (1) that although an article's use as evidence would be restrained where illegally seized though no indictment was pending, a confession differed because the illegally-seized-article rule rested on a property right to have the article returned whereas a confession was an intangible which could not be returned since its contents could not be removed from the memories of officials and, since it could not be returned, an essential condition of judicial suppression was lacking; (2) suppression must be based on the fact that the confession would be excluded upon trial because of incompetence or untruthfulness and the logical result would be the exclusion before the grand jury of *any* evidence incompetent at a trial or shown to be untruthful; (3) an indictment would not harm defendants since the evidence would be excluded at the trial; (4) entertainment of such a motion would unduly burden courts and prosecutors and the decision would be made by judges unable to deal as wisely with the question as the trial judge. Frank, C. J., answered these contentions, respectively, as follows: (1) defendants would have no property right in "contraband" illegally seized and its return would be denied, yet its use as evidence would be restrained; (2) exclusion of a confession would rest upon the illegal means by which it was obtained, not upon such matters as untruthfulness; (3) the social stigma attached to a wrongful indictment often results in grievous, irreparable injury; (4) the argument of undue burden and unintelligent decisions was also applicable to suppression of unlawfully seized documents and was rejected by the Supreme Court. Pointing out that the "third degree" and cognate devices persist today, Judge Frank quoted as still pertinent a statement made in 1930 by an American Bar Association Committee: that for every one of the cases in the official reports, there are many hundreds, and probably thousands of instances of the use of the third degree in some form or other. He felt that the courts should vigorously exercise what slight powers they had to eliminate such misbehavior in view of the small protection afforded by prosecution of and damage actions against offending officers. He cited in a footnote Justice Holmes' statement in *Olmstead* v. *U. S.* (277 U. S. 438,469,470) to the effect that if it is not permissible for the government to obtain evidence illegally as prosecutor, it is not permissible for the government as judge to allow such iniquity to succeed. He said: "Holmes' position in that case is ignored by his misguided detractors, like Palmer, who assert that he espoused a 'philosophy of force' and was thus, in effect, 'a champion of the totalitarian state' ", citing Palmer, "Hobbes, Holmes and Hitler", 31 A.B.A.J. 569, November, 1945. L. Hand, C. J., agreed with Judge Frank that a confession obtained through the violation of a constitutional right could be suppressed, but he based his decision on the limited ground that there was no basis for distinguishing between documents and other property seized in violation of the Fourth Amendment, the suppression of which was well-settled, and a confession procured in violation of the Fifth Amendment. He felt that this innovation in the law was acceptable only because of the higher respect which constitutional rights compel and stated that were it inevitable that all privileges of an accused be treated alike, he would impose upon him the risk of an indictment based on evidence obtained in violation of even these rights, rather than "hobble the prosecution of crime by mincing the trial into successive separate determinations." Judge Frank would go further and suppress before indictment a confession made inadmissible by reason of having been obtained by means of a violation of a federal statute governing the authority of federal officers. He felt that a contrary holding implied criticism of Supreme Court decisions holding inadmissible any evidence obtained illegally by federal officers and that restrictions put on official behavior by statute deserved as much respect from the courts as constitutional restrictions. A. Hand, C. J.,

dissenting, was of the opinion that practical objections outweighed the dangers of injustice and the advantages of logical consistency. The case was reversed and remanded in order that the District Court might pass upon the issue of whether the confessions had been obtained through the violation of the defendants' constitutional rights.

Criminal Law . . statutory proceeding to establish presumption of knowledge . . Forever Amber found not to be obscene, indecent or impure.

Commonwealth v. *Forever Amber,* Massachusetts Superior Ct., March 10, 1947, Donahue, J.

▪ An information in equity was brought by the Attorney General under Massachusetts' new obscene book statute (1945, Ch. 278) to have *Forever Amber* declared obscene. Under the statute, before a seller can be criminally prosecuted for distributing an obscene book, it is necessary to show that he had knowledge of its obscene character (except where the sale was to a person under eighteen years), but an equity decree against the book raises a conclusive presumption that he had knowledge, while a decree in favor of the book raises a conclusive presumption against such knowledge. It was held that the book was not obscene within the test laid down by the Supreme Judicial Court. That was, in the main, whether the book as a whole, read in light of the customs and habits of thought of the time and place offered for sale, tended to incite lascivious thoughts or arouse lustful desires in a substantial portion of its readers.

Damages . . Court takes note of decrease in purchasing power of dollar.

Richey v. *Service Dry Cleaners,* Louisiana Court of Appeal, 2d Circuit, December 12, 1946, Taliaferro, J., (28 So. 2d 284).

▪ Plaintiff brought suit to recover for injuries sustained as a result of an accident caused by the negligence of defendant's agent. She was awarded judgment in the sum of $850. Upon appeal, the judgment was increased to $1500. Taliaferro, J., said: "To determine a proper award of damages in this case, as so often happens, is not without difficulty. The award of the lower court if made a few years ago in a case of this character, would have been adequate. It is not so under present economic conditions. The purchasing power of American money is far below what it was five years ago, and all signs support the belief that many years will have to elapse before improvement in this connection will be measurably attained."

Department of Justice . . special merger unit is created to give advance advice on legality of mergers.

▪ On March 19, 1947, the Attorney General announced the creation of a special merger unit in the Anti-Trust Division of the Justice Department. The press release by the Department contained the following statement: "Businessmen are invited to present all the facts concerning any merger proposal or acquisition to the new unit for examination. Interested parties will receive prompt consideration of the matter and the views of the Department of Justice as to whether it would take action under the antitrust laws, if the proposed merger or acquisition were consummated."

Discovery and Inspection . . written statement of witness's factual account of accident may be obtained by adversary under Rule 33 . . *Hickman* v. *Taylor* construed.

De Bruce v. *Pennsylvania R.R. Co.* U. S. D. C., E. D. Pennsylvania, February 19, 1947, Kirkpatrick, D. J.

▪ In a negligence case, pursuant to Rule 33 of the Federal Rules of Civil Procedure, plaintiff served upon defendant a written interrogatory which required as part of its answer the attachment of a copy of a witness' signed statement, taken immediately after the accident by one other than defendant's attorney and containing only a factual account of the accident. Defendant contended that the decision of the Supreme Court in *Hickman* v. *Taylor* (decided January 13, 1947, reviewed in 33 A.B.A.J. 265, March, 1947), forbade such a disclosure and that that opinion required that a request for such a statement be made under Rule 34 which governs the production of original documents and requires a showing of good cause unnecessary under Rule 33. Kirkpatrick, D. J., held that the *Hickman* case clearly limited its discussion to the disclosure of statements obtained by an attorney for his client in preparation for trial and dealt with no question unconnected with the lawyer's part in the judicial process. He stated: "While there have been plenty of cases in which the Court has included dicta in its opinion, this particular case appears from the reading of the opinion to be one in which it meticulously avoided making any statements broader than the precise question before it." He felt that, although plaintiff had asked for a paper, it would be "misleading formalism" to deal with the request as one for the inspection of an original document, since what was asked for was a disclosure of facts and an identification of the source from which they had been obtained. It was stated, however, that the inquiry should not be limited to bare facts as believed by the party to exist, but should embrace all the information received by him.

Equity . . Government seizure of mines . . owner may enjoin Secretary of Interior, Coal Mines Administration, and naval officers in charge, from operating mine seized after end of war and may compel its return where labor disturbances did not threaten production prior to seizure and Government operation is shown to be inefficient . . personal service not required.

Fox v. *Krug, Secretary of Interior; Capt. Collisson, U.S. Coal Mines Administrator; Lt. Comdr. Franz, SC*

USNR; Capt. Harding, Resident Officer-in-Charge, Operating Mine No. 3 Fox Coal Co.; Lt. Comdr. Gilfoyle, Successor to Capt. Harding, U.S.D.C., N.D. West Virginia, March 7, 1947, Baker, D. J.

■ By Executive Order No. 9728, issued May 21, 1946, the Secretary of the Interior was authorized to take possession of bituminous coal mines in which labor disturbances threatened to interrupt production, if he deemed it necessary in the interest of the war effort. On August 2, 1946, he issued an order, effective August 5, taking possession of Fox Mine No. 3. Fox, the mine owner, was designated operating manager and notice of seizure was posted. Although he never agreed to act as manager for the Government, Fox continued to operate the mine. From the beginning, he contended that he did not have a contract with the United Mine Workers of America and would not be bound by the Krug-Lewis Agreement. On January 6, 1947, he was notified that he was removed as manager and, on January 7, the Coal Mines Administration physically took over the operation. Fox brought suit to enjoin defendants from further interfering with the mine's operation and to obtain possession of his property. Baker, D. J., found that administrative expenses had increased almost five times under Government operation while production had not equaled twice the average monthly production under Fox' operation; that the mine was losing money under Government operation and that the rate of loss was increasing rapidly while Fox had always operated the mine at a substantial profit; that, unless the mine made money, Fox would become bankrupt; that the Government was operating the mine in such a manner as to jeopardize its entire future; that, although Fox had no contract with the United Mine Workers, no discrimination had been practiced against union members; that there had been no labor trouble at the mine from late November, 1946, through January 6, 1947, (an interesting fact was that every witness testified that the most harmonious relations in the history of the mine existed during December, 1946); that, since the purpose of the Executive Order was to seize mines to avoid labor difficulties, there was no occasion to invoke the remedy in this instance; that the main purpose of the seizure was to compel re-employment of four union employees discharged for inefficiency and obviously not desirable employees. He held that a case of irreparable injury had been made out which required the granting of a temporary injunction as a matter of law.

Because the questions involved required considerable study and yet a prompt determination was necessary, Judge Baker adopted the procedure of directing each side to submit evidence without prejudice to defendants on the question of whether or not their appearance was a special one as they maintained. On the question of the Court's jurisdiction, he held that physical seizure was necessary under the Fifth Amendment to make the seizure effective, that the seizure took place after the war's official ending, and thus that decisions which dealt with the Government's powers in time of active warfare did not apply. He refused to sustain the contention that the Secretary of Interior and the naval officers could only be sued in the District of Columbia courts and that personal service was necessary. He felt that if they could take the mine through agents, "this Court can require them to return the mine." (The Department of Justice announced on March 14 that the Fourth Circuit Court of Appeals had granted the Government a stay of execution.)

Federal Communications Commission . . use of recording devices in connection with telephone service is approved.

(Digested in 15 U.S. Law Week 2539, April 1, 1947.)

■ On March 24, 1947, the Commission handed down a decision in a proceeding which resulted from a conflict between telephone tariff provisions which prohibited the use of electrical and mechanical apparatus in connection with the service or facilities furnished by the telephone companies and the demand for the use of telephone recording devices. The contention of the Bell System Companies that the Commission lacked jurisdiction over the proceeding because the devices must be connected with facilities used jointly for interstate and intrastate telephone services was held to be erroneous since it ignored the fact that such recording devices need not be used in connection with intrastate calls. The Commission was of the opinion that the use of telephone recording devices should be permitted in connection with interstate and foreign services, that the furnishing, installation and maintenance of the necessary connecting device should be the responsibility of the telephone companies, that the devices should be used only when parties were notified that the conversation was being recorded, that an automatic tone warning, uniform throughout the United States, would be adequate notification, and that the present tariff regulations were unlawful under §201 of the Communications Act since they barred the use of recording devices. A conference on the appropriate engineering standards to be adopted was called for April 14, 1947.

Federal Communications Commission . . request to standardize color television denied.

(Digested in 15 U.S. Law Week 2522, March 25, 1947.)

■ On March 18, 1947, the Commission denied a petition of the Columbia Broadcasting System that it amend its Standards of Good Engineering Practice Concerning Television Broadcast Stations so as to permit operation of color television stations on the basis of a system developed by Columbia. As to the necessity for Commission approval of standards, it stated that, if the transmitters and receivers did not meet certain standards, the receivers would be unable to accept transmis-

sions from transmitters, and that if standards were not set, the public could not purchase receivers with any confidence that their receivers would not become useless immediately. It held that before approving proposed standards, it must be satisfied that the system proposed would work and that it was as good a system as could be expected within any reasonable time in the foreseeable future. In its opinion, the proposed system had not been adequately tested and there were other systems which offered the possibility of cheaper receivers and narrower band widths that had not been fully explored. Accordingly, it was of the view that the proposed standards should not be adopted.

Securities and Exchange Commission . . adoption and amendment of rules under consideration.

Code of Federal Regulations, Tit. 17, Ch. II, Pt. 270, 230, 239 (12 F. Reg. 1994, 2264).

■ The Commission announced in the *Federal Register* of March 26, 1947, that it had under consideration proposals with respect to the adoption and amendment of rules pursuant to the Investment Company Act of 1940, particularly §§6(c), 17(a), 17(b), 17(d) and 38(a) thereof. The proposals concerned the adoption of a rule providing a procedure to be followed with respect to applications filed pursuant to the act or the rules and regulations, the adoption of a rule exempting from §17(a) transactions between a registered investment company and one or more of its fully-owned subsidiaries or between two or more fully-owned subsidiaries of such a company, and the amendment of Rule N-17D-1 which pertains to applications regarding bonus, profit-sharing, and pension plans and arrangements.

Announcement was made in the *Federal Register* of April 4, 1947, that the Commission was considering revision of the rules comprising Regulation C pursuant to the Securities Act of 1933. Regulation C deals with registration and registration procedure.

Trial . . prejudicial error . . erroneous rejection of challenge for cause not prejudicial error where not shown that venireman served or that peremptory challenge was used to exclude him or that objection was made to twelve who served.

Bufford v. *State,* Nebraska Supreme Ct., February 28, 1947, Wenke, J. (Digested in 15 U.S. Law Week 2513, March 18, 1947).

■ Bufford was convicted of assault with intent to inflict great bodily injury. He assigned as error the trial court's overruling of his challenge for cause of a prospective juror whose *voir dire* examination showed that she served as juror in the prosecution of one Skelton whose prosecution arose out of the same incident as Bufford's and who was convicted of the same offense as Bufford. The record showed that another juror who had served in the first case went unchallenged and served in the second as foreman. Defendant exhausted his peremptory challenges. The ruling in the case of *Seaton* v. *State* (106 Neb. 833) that "Where two or more persons are jointly indicted or informed against for the commission of a single offense and sever in their trials, jurors who sat in the trial of one are thereby disqualified to sit in the trial of another" was held by the Court to be applicable where two or more persons are separately indicted or informed against for the commission of an offense arising out of the same incident so that the same witnesses and testimony would necessarily be used against each. It thus held that the jurors who had served in the Skelton prosecution were disqualified to serve in the Bufford prosecution. However, the Court held that an erroneous overruling of a challenge for cause of a prospective juror was not ipso facto prejudicial error, but that a reversal would result only upon a showing that the error brought injury to the accused. In holding that the record did not show prejudicial error, the Court modified two of its previous decisions which had held that removal of the disqualified venireman by peremptory challenge did not cure the defect. Since the record did not show that the challenged venireman had served as a juror, that Bufford employed any of his peremptory challenges to exclude her, or that he made objections to the twelve jurors who actually tried him, the sentence was affirmed. Yeager, J., dissenting, pointed out that the record did show that the foreman had served in the previous trial and stated that defendant by objecting to the earlier-called venireman had made his position clear so that no further challenge was necessary to raise the point in the case of the foreman. Simmons, C. J., joined in the dissent of Yeager, J., but dissented further on the ground that the Court should presume that the challenged juror remained and should not put upon Bufford the burden of showing that the prejudicial error had not been removed.

War Department . . claims against the U. S. . . claims cognizable under Federal Tort Claims Act.

Code of Federal Regulations, Tit. 10, Ch. III, Pt. 306 (12 F. Reg. 1476, 1647).

■ In the March 5, 1947, issue of the *Federal Register,* the War Department announced the addition of a new section, section 29, to Part 306 of Chapter III, Title 10, Code of Federal Regulations. The new section contains the rules and regulations affecting claims cognizable under the Federal Tort Claims Act. They permit the Secretary of War or his designee to allow reasonable attorneys' fees out of, but not in addition to, the amount of the award. If the award is $500 or more, the fees are limited to ten per centum of the award.

The *Federal Register* of March 11, 1947, contains the announcement by the War Department of miscellaneous amendments of other sections of Part 306 which deal principally with

claims other than those cognizable under the Federal Tort Claims Act.

Witnesses . . witness may not be compelled to give his opinion as expert against his will.

People of New York ex rel. Kraushaar Bros. & Co., Inc. v. *Thorpe,* New York Ct. App., February 27, 1947, Thacher, J.

■ Relator subpoenaed an involuntary expert witness who previously had prepared for a prior owner an appraisal of the property in suit. The witness declined to accept a fee and refused to testify, stating that he did not wish to take part in the case. The trial court ruled that he had a right to refuse to answer any question connected with his experience and judgment as a real estate expert and not as an ordinary lay witness. The Court upheld the ruling of the lower court. It recognized that the other states were in conflict on the question, some holding that a witness could not be compelled to give expert testimony but might contract to do so for an adequate consideration, and others requiring experts to give professional opinions when they were able to do so without study of the facts or other preparation. In the Court's opinion, the latter rule is "quite unsatisfactory" for "In the realms of medicine, law, science, and many other callings where highly specialized knowledge is essential, only the most eminent are competent to answer *ex tempore* and defend impromptu opinions upon cross-examination, but none, without reflection upon his professional ability, may confess ignorance."

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THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

International Law in the Americas

■ Many North American lawyers have been prone to assume that the efforts to state or codify international and world law, as an aid to its progressive development and authority, have been principally a project of the profession of law in the United States and Canada. In reality, the progressive development and statement of law to govern Nations have long been earnestly advocated and worked for, in other states of this hemisphere. Understanding of this broader perspective is fairly essential to a comprehension of our Association's current activities, under the leadership of President Carl B. Rix, the Committee for Peace and Law Through United Nations, and the Section of International and Comparative Law.

The history of the codification movement in the Americas has recently been traced by the Juridical Division of the Pan American Union in its pamphlet on "The Codification of International Law in the Americas", in No. 20 of the Union's Law and Treaty Series. The following is an excerpt from this authoritative source:

"The codification of international law in the Western Hemisphere is not a recent undertaking. The initial attempts date back to the First Congress of American States held at Panama in 1826. The idea itself, however, may be traced even further back in Bolivar's lifetime. In a letter which he wrote in 1815, the Liberator conceived of an America composed of 'independent nations all bound by one common law which should fix their foreign relations' and glimpsed the day when 'the relations of political societies would receive a code of public law as a rule of universal conduct.'

"Beginning with the meeting of 1826, the subject of codification has been one of the most important topics in practically all inter-American gatherings. Bearing in mind that the codification of international law can not be efficiently and systematically carried out without first establishing an effective procedure, the American States gave early consideration to the question of method. Experience gradually made it clear that codification could not be carried out by a single person, or a single State, but by the joint efforts of jurists representing the various legal viewpoints. In harmony with this conclusion, the American nations agreed at the Second International Conference of American States, held at Mexico City in 1901-1902, to assign the task of codification to a technical body. At that Conference a Convention was adopted providing for the appointment of a Commission of Jurists charged with the task of preparing codes of public and private international law 'to govern the relations between the American nations'. Although this agency was not established, because the necessary number of States failed to ratify the Convention, the effort did not end there, but was continued with increasing interest at the Third International Conference of American States, where a Convention was concluded providing for the creation of an International Commission of American Jurists.

"The International Commission of American Jurists, whose name was changed to International Conference of American Jurists by the Eighth International Conference of American States (Lima, 1938), met for the first time at Rio de Janeiro in 1912 and prepared a number of projects.

"The Fifth Conference, held at Santiago in 1923, reorganized the International Commission of Ameri-

can Jurists, and provided that its studies and conclusions should be submitted to the Sixth International Conference of American States.

"The codification of international law is of its very nature a slow process. Before a principle or a subject may be codified it must be ripe for international agreement. Realizing the importance of this fact, the Fifth Conference stressed that 'in the domain of international law, codification should be gradual and progressive.' This principle was reiterated by the Seventh Conference at Montevideo in 1933, the latter adding that it would be a 'vague illusion to think for a long time of the possibility of carrying it out completely.'

"In 1927 the International Commission of American Jurists held its second meeting in the same City of Rio de Janeiro. At that meeting the Commission drafted a series of projects on various topics of international law, which became the bases of several important conventions and treaties signed at the Sixth International Conference of American States held at Havana in 1928. The Commission was greatly assisted by the preparatory work undertaken by the American Institute of International Law, an unofficial organization created in 1916, whose aid was enlisted at the request of the Governing Board of the Pan American Union.

"The results accomplished by the Commission of Jurists, the first official body which successfully endeavored to codify the two branches of international law, have been of outstanding value in the progress made during the last 30 years in the work of codification.

"The conventions and treaties concluded at the Havana Conference constituted an important step forward in the work of codification. These instruments demonstrate eloquently the fruitful results that can be obtained from thorough preparatory work by technical agencies, as well as from the cooperation of official and private entities in this field of endeavor. Private organizations have rendered valuable assistance to the Pan American Union and to the official agencies engaged in the work of codification. These services have been given sometimes voluntarily and other times at the specific request of the Pan American Union or the Pan American Conferences. The latter have repeatedly solicited, particularly in the last fifteen years, the cooperation of private organizations and institutions in the work of codification.

"Encouraged by the results achieved, the Sixth Conference of Havana provided, among other things, for the continuance of the International Commission of Jurists and the appointment of three permanent committees, one in Rio de Janeiro on Public International Law, another in Montevideo on Private International Law, and a third in Havana on Comparative Legislation and Uniformity of Legislation.

"The Seventh International Conference of American States, Montevideo, 1933; the Inter-American Conference for the Maintenance of Peace, Buenos Aires, 1936; and the Eighth International Conference of American States, Lima, 1938, contributed also in a very material way to furthering the work of codification, each one adopting new measures for the 'gradual and progressive codification of international law.'

"The Seventh Conference provided for the establishment of a Commission of Experts on the Codification of International Law and for the appointment of national committees on codification. The Buenos Aires Conference revised the procedures and re-established the Permanent Committees created by the Sixth Conference, and abolished by the Seventh. Later, the Lima Conference, with the purpose of facilitating and expediting the work of codification, again revised the procedure, placing special stress on the coordination of the work of the different entities, and establishing the specific duties which each was to perform. Experience had revealed the need of determining with clarity the successive steps of the procedure and of defining the scope of the activities of the various codification organizations.

"The system devised by the Eighth Conference could not be put into practical operation because of the Second World War, which made it necessary to postpone the meetings of the codification agencies.

"In the intervening years, a great deal of thought has been given to the future of the work of codification, and particularly to the question of procedure. In spite of the excellent services performed by the individual agencies, the conviction has gradually crystallized that the existing machinery is rather slow and inefficient due principally to three factors: (1) the committees are composed of members who are unable to devote full attention to the work of codification because of their professional activities in their own regular fields; (2) the members of the committees in some cases reside in different countries; and (3) the functions performed by the several agencies overlap and duplicate one another in many respects. These factors make it difficult to establish the coordination necessary to produce smooth and expeditious results. Consequently, in recent years the opinion has been leaning more and more towards the creation of a central organization of a permanent character which could devote its full time to the work of codification and make more rapid and efficient progress. This opinion is shared by the Codification Committees themselves. The Inter-American Juridical Committee, the latest agency to be assigned codification functions, has formally manifested this view.

"At the Third Meeting of the Ministers of Foreign Affairs of the American Republics held at Rio de Janeiro in 1942, the American States requested the Inter-American Juridical Committee 'to develop and coordinate the work of codifying international law'. In pursuance of this assignment, the Juridical Committee formulated in 1945 a recommendation on the reorganization of the agencies engaged in the codification of international law. In its report, which accompanies the recommendation, the Committee comes to the conclusion 'that before the work can be efficiently and systematically carried out it will be necessary to coordinate the numerous agencies created from time to time by the American Governments to undertake the work of codification,' and suggests the establishment of a central agency of a permanent character.

"The Recommendation of the Inter-American Juridical Committee deals only with the codification of public international law. That is also the scope of the present report. In passing, however, it is of interest to note that in the field of private international law the American States have also made considerable progress.

"The recommendation of the Juridical Committee is under study by the Government members of the Pan American Union. The problem raised therein is also being considered at present by the Governing Board of the Pan American Union under Resolution IX of the Inter-American Conference on Problems of War and Peace held at Mexico City in 1945. This resolution deals with the reorganization, consolidation and strengthening of the Inter-American System. By virtue of the directives of that resolution, which are of a provisional character, steps are being taken to prepare various instruments and recommendations

for consideration at the Ninth International Conference of American States scheduled to meet at Bogota in 1947. At that Conference the provisions of Resolution IX are to be given permanent form and effect."

On December 4, 1946, the Governing Board of the Pan American Union approved and transmitted to the Governments of the Americas a Project of Resolution, prepared by its Committee on the Organization of the Inter-American System, for the establishment of an Inter-American Council of Jurists. This proposal will be submitted to the Ninth Conference of American States, to be held at Bogota in 1947 or 1948:

"The Ninth International Conference of American States

RESOLVES:

1. There is hereby created the Inter-American Council of Jurists, which shall devote itself to the codification of public international law and private international law; and shall endeavor, as far as possible, to unify the civil and commercial legislation of the different American countries.

2. The Inter-American Council of Jurists shall supersede all existing inter-American agencies which function in the field of codification or unification.

3. The Inter-American Council of Jurists shall be an integral part of the Pan American Union and shall be considered as a dependent organ of the Governing Board.

4. The Inter-American Council of Jurists shall be composed of jurists of recognized ability, chosen one by each government member of the Pan American Union.

5. The Inter-American Council of Jurists shall meet at the place and date determined by the Governing Board of the Pan American Union.

In recognition of the outstanding contribution of the United States of Brazil in the field of the codification of international law, the first meeting shall be held in Rio de Janeiro.

6. The Inter-American Council of Jurists shall designate a Permanent Committee, composed of members appointed by six of the American governments, which shall function at the headquarters of the Pan American Union. This Permanent Committee shall represent all the countries members of the Pan American Union.

7. An endeavor shall be made to have represented on the Permanent Committee at all times the two great juridical systems of America: the Latin and the Anglo-Saxon.

8. The countries designated by the Inter-American Council of Jurists to form the Permanent Committee shall have the right for three years to name each one a member of the Committee. However, in the first election two countries shall have that right for one year, two for two years, and two for three years. The assignment of these terms shall be by lot.

9. If within a reasonable period the government of a country chosen does not accept the designation, or if during the interval between meetings of the Inter-American Council of Jurists the term assigned to a country should expire, the Governing Board of the Pan American Union shall designate another country provisionally, after consulting the wishes of the government concerned with respect to such designation.

10. The Inter-American Council of Jurists and the Permanent Committee shall elect their respective Chairmen and shall function in accordance with the regulations which the Governing Board of the Pan American Union may approve.

11. Honoraria, travel and other expenses of the members of the Council and of the Committee shall be paid by the respective governments.

12. The Pan American Union shall provide the Council and the Committee with such secretarial services as may be necessary.

13. The functions of the Inter-American Council of Jurists shall be:

(a) To assign to the Permanent Committee the study of subjects which may be considered susceptible of codification, or which may have been specifically recommended to the Council by the International Conferences of American States, the Meetings of the Ministers of Foreign Affairs, or the Governing Board of the Pan American Union;

(b) To study the projects that may be submitted to it by the Permanent Committee and to draw up the definitive text;

(c) To make studies and draft recommendations, resolutions, treaties, conventions or other instruments, whenever the Governing Board of the Pan American Assemblies may so request;

(d) To stimulate studies in comparative legislation in all the countries of America.

14. The functions of the Permanent Committee shall be:

(a) To undertake, with the cooperation of the appropriate office of the Pan American Union, the research and preparatory work that the Council may assign to it and that will facilitate the effective performance of the Council's functions;

(b) To perform such other duties of a juridical nature as may be assigned to it by the Inter-American Council of Jurists or the Governing Board of the Pan American Union.

15. When the preparatory work is sufficiently advanced to justify calling a meeting of the Inter-American Council of Jurists, the Permanent Committee will so notify the Governing Board of the Pan American Union.

16. The studies, projects, reports, recommendations, resolutions, treaties, conventions and other instruments prepared by the Inter-American Council of Jurists shall be submitted to the Governing Board of the Pan American Union, which shall send the document in question to the governments for their information, and shall decide in each case whether to submit it to an International Conference of American States or a special technical conference of plenipotentiaries, or to open it for signature at the Pan American Union.

17. In order to facilitate its work, the Council shall endeavor to secure the cooperation of the national committees for the codification of international law, as well as of private societies of international law and other interested groups.

18. The Inter-American Council of Jurists shall establish the closest cooperative relations with the corresponding agency of the United Nations with a view to effectively coordinating and harmonizing their respective activities. To this end, the Inter-American Council of Jurists shall propose to the Governing Board of the Pan American Union the measures it may deem adequate.

Our Younger Lawyers

by **William R. Eddleman** • Secretary, Junior Bar Conference

■ To many historians it has seemed that Abraham Lincoln's place in history has been due in a large degree to the impact of his personality upon the problems of underprivileged and forgotten men. Critical analysis today lends support to the fact that for some years young lawyers and middle-class Americans have in a large degree been left in the classification of virtually forgotten men.

The Junior Bar approaches vigorously both these groups. With unprecedented cooperation from the radio industry, W. Carloss Morris of Houston, Texas, our National Director of Public Information, and his associates, are bringing to the fireside of "John Doe American" and "Jane Doe American" information as to how best to obtain and use the services of lawyers. Some of these programs include information as to the unceasing battle of our Association and profession in favor of curbing abuses and improving the administration of justice. Other programs stress the duty of every citizen to think about and plan for law and order on an international basis through The United Nations as a preventive and substitute for future wars of death and destruction.

In order to encourage and inspire local and State Public Information Directors to do their work well, National Director Morris, is offering as prizes two gold wrist-watches which will be engraved to indicate the occasion for the awards. One watch will go to the State Director who has done the outstanding job on a Nation-wide basis; the other, to the local Director who has done the best work in his field. These awards will be made at the 1947 Annual Meeting of the Association in Cleveland. This program is the Junior Bar's No. 1 objective for 1946-47.

Recently, through an article in the *American Magazine*, entitled "When You Need a Lawyer", by Frederick G. Brownell, and a reprint of it in *Reader's Digest*, a large segment of middle-class America has been acquainted with the "Lawyers Reference Plan." As now operative in Chicago, the plan works through the medium of a panel. The attorney members of this panel agree that they will accept $3.00 for the first one-half hour of consultation or a maximum of $5.00 for the first interview, no matter how much time that may require. Beyond interview and consultations and advice, the member of the panel and the client, Mr. and Mrs. "John Doe American", are on their own. Certain minimum fees are agreed to by members of the panel for handling various specific types of business. The panel is intended to reach and to serve that great middle-class group of Americans who do not feel able to pay the customary charges of the larger law offices, yet would be very hesitant to accept the type of legal aid which has been developed by the American Bar to meet the needs of those unable to pay at all. Cards announcing the availability of the services of this panel are placed in such suitable locations as the offices of County or Prosecuting Attorneys, District Attorneys, various governmental enforcement agencies, and other places where persons in need of competent legal counsel will see them.

Referrals are made by a secretary on a basis of rotation among members of the panel. Two or three names from the panel are suggested to each applicant. One of the first things determined is as to whether or not the applicant has previously had the services of any attorney. If so, the panel's services are not made available as to a matter with respect to which he has consulted the attorney. Milwaukee has a similar system in operation.

W. CARLOSS MORRIS

With the excellent work done by our Association as to the standards for admissions to the Bar, the Activities Committee of the Junior Bar Conference is considering recommending such a referral plan as a program to occupy the attention and energies of local affiliated Junior Bar groups throughout the country. It is believed by many that this will afford an excellent means for young lawyers to become initially experienced in diversified law practice as well as help to solve the customary economic problem with which they are generally confronted during their first few years of practice. At the same time, such a program would tend to increase the respect of that large group of middle-class Americans for the legal profession, through making available to them legal services which they have not previously thought were within their means.

Question of the Month: What do you think of having a Junior Bar group in every city and State throughout the nation? Send your answers and comments to the National Secretary, W. R. Eddleman, Seaboard Building, Seattle 1, Washington.

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Practising lawyer's guide to the current LAW MAGAZINES

ANTI-TRUST LAWS—*"The Supreme Court, the Interstate Commerce Commission and the Freight Rate Battle":* Another addition to the growing literature of the application of the anti-trust laws to the conference method of railroad freight-rate-making is in the February issue of *The North Carolina Law Review* (Vol 25—No. 2; pages 172 to 191). The author, J. O. Tally, Jr., Instructor in Law at Wake Forest College, analyzes the five-to-four decision of the Supreme Court in *Georgia* v. *Pennsylvania Railroad Co., et al.,* 324 U. S. 439 (1945), with emphasis upon the opposing views of the majority and minority as to the separability of rate-fixing methods and the rates fixed, the latter a matter within the primary administrative jurisdiction of the Interstate Commerce Commission. While recognizing the practical necessity and desirability of the conference method of rate-making, the author does not foresee all the dangers to the continuance of the existing system which some writers have prophesied as flowing from the Court's decision. He points out that the decision may mean merely some modification of prevailing rate-making methods "to restore that degree of competition envisaged by Congress". As to future policy, he sides with those who feel that supervision of rate-making agencies "can be more constantly and efficiently administered by the [Interstate Commerce] Commission than by sporadic suits by the Justice Department" (The University of North Carolina Law Review, Chapel Hill, N. C.; price for a single copy: 80 cents).

BANKRUPTCY—*Liquidation of Corporations in Bankruptcy Reorganization:* In the December issue of the *Harvard Law Review* (Vol. LX—No. 2; pages 173-199), Professor William L. Cary of the Harvard Business School traces the development of the legal theory on which federal Courts have based their authority for ordering or sanctioning corporate liquidations under Section 77B and Chapter X of the National Bankruptcy Act. It is pointed out that the power of the Court to order liquidation of the debtor's assets outside a reorganization plan has been limited generally to partial liquidations to dispose of assets which are unnecessary or burdensome to the continuation of the enterprise in its reorganized form, to liquidations of "perishable" assets, and to a few other special circumstances. Liquidations pursuant to plans of reorganization have repeatedly received judicial sanction except where the pendency of receivership proceedings in State Courts, or other circumstances, impugn the good faith of the petitioner. Except in the latter type of case, the benefits to be obtained by orderly liquidation in reorganization proceedings lead the author to the conclusion that a debtor should not be adjudicated a bankrupt, if (1) there is a going-concern value on the basis of which the parties can formulate a program of rehabilitation, or (2) the parties can sell the assets; or (3) if an orderly liquidation would measurably increase the proceeds to be distributed among the claimants. (Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: 75 cents).

COURTS AND JUDGES—*"Judge Learned Hand":* Lawyers who cherish the records of great personalities in American law will be especially interested in the February issue of the *Harvard Law Review* (Vol. LX—No. 3; pages 325-422) which in its main part is dedicated to articles of appreciation of Learned Hand, Senior Judge of the United States Circuit Court of Appeals for the Second Circuit. Beginning with prologues of praise by Mr. Justice Frankfurter and Charles C. Burlingham, the symposium includes a commentary on Judge Hand's literary style, by George Wharton Pepper; one on his contributions to the work of the American Law Institute, by Judge Goodrich of the neighboring Third Circuit; another by Judge Wyzanski of the United States District Court for Massachusetts, which considers Judge Hand's contributions to public law, and several additional contributions. It is announced also that the editors of the *Harvard Law Review* have compiled a classified table of all the judicial opinions of Judge Hand through July of 1946, which has been placed in the custody of the Harvard Law School Library. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: 85 cents).

INTERSTATE COMMERCE—*"Railroad Reorganization — The Long and Short of It":* "To examine briefly the criticisms levelled at the existing procedures" for railroad reorganization, "analyze the recent

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.

proposals, and in the light of these discussions on the past to draw conclusions as to the best procedure for the future", comprises the scope of the article by Hubert L. Will, of the Chicago Bar, in the January-February issue of the *Illinois Law Review* (Vol. XLI—No. 5; pages 608-628h). Of the two sections of the Federal Bankruptcy Act, under which railroad reorganizations have been attempted, Section 77, the author states, "is too slow and has resulted in too inflexible capitalizations while Chapter XV is inconsistent with generally accepted reorganization principles and frequently results in plans which, though speedily effected, are economically unsound from a long range point of view". He gives a succinct summary of the railroads' financial problems —"Some Facts About the Railroads". Among the analyzed current proposals for improvement are the Hobbs Bill and the Wheeler-Reed Bill, the latter vetoed by President Truman last August, both in the last Congress. Following a concise definition of the author's standards for an ideal railroad reorganization bill, an eight-page appendix contains his draft of a remedial bill, in the form of an amendment to Part I of the Interstate Commerce Act, by the addition of a new Section 20b. (Address: Illinois Law Review, 357 East Chicago Avenue, Chicago, Ill.; price for a single copy: $1.00).

MONOPOLIES—*"Price-Fixing in the Motion Picture Industry":* In *United States* v. *Paramount Pictures, Inc., et al.*, 66 F. Supp. 323, the United States District Court for the Southern District of New York ruled in 1946 that the price-fixing agreements for motion picture distribution there involved were "illegal on alternative grounds: First, that each distributor was conspiring with exhibitors; second, that even if it was lawful for a distributor and an exhibitor to make such agreements, that they were unlawful because they were the result of a conspiracy among the distributors." A concise Comment in the January-February issue of the *Illinois Law Review* (Vol. XLI—No. 5; pages 630-646) outlines these "vertical price-fixing" and "horizontal price-fixing" conspiracies (which included some "diagonal price-fixing" elements). Especially interesting is the discussion of the legality of the "vertical price-fixing" conspiracy in the light of the Miller-Tydings amendment to the Sherman Act, to legalize the maintenance of resale prices as to trade-marked articles, and of the leading case of *United States* v. *General Electric*, 272 U. S. 476 (1926), which held that a patentee can lawfully fix the price at which a licensee may sell a patented article. Concluding the comment is a summary of the remedy adopted by the Court in the *Paramount Pictures* case, to the effect that although the retention of the theaters by the defendants was permitted, the latter were enjoined from entering into agreements with exhibitors to fix minimum theater admission prices and were ordered to institute a new system of marketing films. (Address: Illinois Law Review, 357 East Chicago Avenue, Chicago, Ill.; price for a single copy: $1.00).

MORTGAGES—*"The Mortgage in Essence: A Stride Forward in Equity":* The application of equitable rules governing security transactions, in factual situations which have been the subject of recent litigation, is considered in an article under the above title which appears in the February issue of the *Rocky Mountain Law Review* (Vol. 19—No. 2; pages 123-134). Frazer Arnold, former President of The Law Club of Denver, is the author. He suggests that recent developments in the law will influence Courts to examine more closely the substance of contracts so as to prevent forfeiture where, despite the form of the contracts, mortgage relationships are indicated. (Address: Rocky Mountain Law Review, University of Colorado, Boulder, Colorado; price for a single copy: $1.00).

TAXATION — *Federal — "Federal Tax Liens and Their Enforcement":* Samuel O. Clark, Jr., formerly Assistant Attorney General in Charge of the Tax Division of the Department of Justice, reviews in the January issue of the *Virginia Law Review* (Vol. 33—No. 1; pages 13-43) an important phase of creditors' rights, normally little known outside the halls of Government. He shows the scope of tax liens, the special provisions for recording, their priorities, their enforcement, and their removal and release. The discussion of the removal of tax liens in the manner provided by the several statutes and of their release by administrative processes is in a practical vein, and will aid the lawyer who finds his client's property enmeshed in the restrictive entanglements of this technical field of law. (Address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.; price for a single copy: $1.00).

TAXATION — *Federal Income Taxes:* The belated December issue of the *University of Chicago Law Review* (Vol. 14—No. 1; pages 1-65) is largely a memorial to Henry C. Simons, late Professor of Economics in that Law School. Dean Wilber G. Katz gives a brief picture of Professor Simons' influence on the School's experimental program in the integration of the study of law with economics, history and related fields. There is also a reprint, from the September issue of *Fortune,* of "The Testament of Henry Simons".

Of chief interest, however, is the article on "Federal Tax Reform", prepared from an unpublished manuscript by Professor Simons. In this he advocated a broad revision of the basic procedure for taxation. The chief points of his program appear to be: The utilization of personal income as the predominant source of federal revenues; repeal of the corporate tax; introduction of an averaging procedure under the personal income tax to eliminate the burdens of fluctuating incomes; elimination of capital gain and loss treatment; treatment of all transfers, whether by gift, inheritance, sale or otherwise, as a "realization"; elim-

ination of what he regarded as the discriminatory community-property method of taxing income and integration of the gift and estate taxes. (Address: University of Chicago Press, 5750 Ellis Avenue, Chicago 37, Ill.; price for a single copy: $1.00).

TORTS—*"Liability in Tort for Negligent Statements":* To the *Canadian Bar Review* for February (Vol. XXV—No. 2; pages 123-138), Dean G. W. Paton, of the University of Melbourne, contributes an instructive article on the actionability of negligent words. Starting with *Derry* v. *Peek* [1889] (14 A. C. 337), he surveys the English cases, which generally refuse to impose a liability in tort for negligent misrepresentation, and then compares their stricter rule with American decisions, notably that of the New York State Court of Appeals in *International Products Co.* v. *The Erie R. R. Co.,* (244 N. Y. 331), which recognized that "the present rules of English law are too narrow" and that it is "more appropriate to adopt the rules of the American Restatement" of the Law of Torts, Sections 311 and 522, at least to the point of imposing liability on those who in the course of business undertake to give gratuitous advice. (Address: Canadian Bar Review, Room 505, Ottawa Electric Building, Ottawa, Ont.; price for a single copy: 75 cents).

TRIALS—*"The Value of Clear Instructions":* A short article on an important phase of jury litigation—the preparation of proper requests for instructions for the jury—was in the December-February issue of the *University of Kansas City Law Review* (Vol. XV.—No. 1; pages 9-19). As an aid to lawyers who engage in jury trial work, S. L. Trusty gives an outline of the essential elements of a lawsuit as a guide to the preparation of the requests to charge. He says he has used this outline for thirty years and that it has proved helpful, not only in determining what are the vital angles of his own case, but also in ascertaining the essential elements of his opponent's case as reflected in his requests to charge. (Address: University of Kansas City, Kansas City 4, Mo.; price for a single copy: $1.00).

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Tax Notes

■ Prepared by Committee on Publications, Section of Taxation: Mark H. Johnson, Chairman, New York City, Willian A. Blakely, Dallas, Texas, Phillip Bardes, Howard O. Colgan and Martin Roeder, New York City, Allen Gartner, Washington, D. C., and Edward P. Madigan, Chicago.

Section Organization

A meeting of the Council and committee chairmen of the Tax Section was held at Hotel Pennsylvania, New York City, on March 22 and 23. A large part of the time was devoted to organization and procedure matters.

William A. Sutherland, chairman of the Section, reported that the recent canvass of Section members showed an unexpected number of volunteers for work on the various Section committees. The Council approved his suggestion that the customary size of the committees be enlarged, and that as many of these members as was practicable should be assigned to the committees for which they had volunteered. It was generally agreed that all members should have the opportunity to do committee work, and that a rotation of appointments would ultimately create a strong and representative body of expert opinion in each field of the Section's work.

Present Committees and Chairmen

The following is the list of present committees and the respective chairmen (* indicates newly created committees):

General Committees of the Section:

Cooperation with State and Local Bar Association Tax Groups: Allan H. W. Higgins, 84 State Street, Boston 9, Massachusetts.

Coordination of Federal, State and Local Taxes; Henry F. Long, State House, Boston 33, Massachusetts.

Membership: Wm. R. Eddleman, Seaboard Building, Seattle 1, Washington.

Publications: Mark H. Johnson, 9 East 40th Street, New York 16, N. Y.

Federal Tax Committees:

Correlation of Federal Income, Estate and Gift Taxes: William C. Warren, Kent Hall, Columbia University, New York 27, N. Y.

Federal Estate and Gift Taxes: Paul E. Farrier, First National Bank of Chicago, Chicago 90, Illinois.

Federal Excess Profits Taxes: E. Charles Eichenbaum, Boyle Building, Little Rock, Arkansas.

Federal Excise and Miscellaneous Taxes: David W. Richmond, 135 South LaSalle Street, Chicago, Illinois.

Federal Income Taxes: James S. Y. Ivins, Southern Building, Washington 5, D. C.

Old Age Benefit and Unemployment Insurance Taxes: Bryan C. S. Elliott, Carnegie-Illinois Steel Corporation, Carnegie Building, Pittsburgh 30, Pennsylvania.

Special Committees:

*Bureau Practice and Procedure: Robert Ash, Munsey Building, Washington 4, D. C.

Federal Judicial and Administrative Procedure: H. C. Kilpatrick, American Security Building, Washington 5, D. C.

*Internal Bureau Procedure: James K. Polk, 40 Wall Street, New York 5, N. Y.

Internal Revenue Administrative Code: James K. Polk, 40 Wall Street, New York 5, N. Y.

International Tax Treaties: John H. Alexander, 40 Wall Street, New York 5, N. Y.

*Organization Exempt under Section 101 I.R.C.: Merle H. Miller, Consolidated Building, Indianapolis 4, Indiana.

Pension and Profit Sharing Trusts, John W. Drye, Jr., 70 Broadway, New York 4, N. Y.

Relations with Practising Law Institute: Weston Vernon, Jr., 15 Broad Street, New York 5, N. Y.

Tax Court Procedure: Hugh C. Bickford, 815 15th Street, N.W., Washington 5, D. C.

*Taxation of Partnerships: Mark H. Johnson, 9 East 40th Street, New York 16, N. Y.

Treasury Department Regulations: Thomas N. Tarleau, 15 Broad Street, New York 5, N. Y.

*Unauthorized Practice of Law: F. M. Bird, Haas-Howell Building, Atlanta 3, Georgia.

State and Local Tax Committees:

*Interstate Aspects of State and Local Taxes, William C. Warren, Kent Hall, Columbia University, New York 27, N. Y.

*State and Local Taxes: Richard C. Beckett, 135 East 11th Place, Chicago 5, Illinois.

Junior Bar Committee:

*Junior Bar Committee of Section of Taxation: Lewis R. Donelson III, Commerce Title Building, Memphis 3, Tennessee.

State and Local Taxes

Considerable time was devoted to the difficult problem of the Tax Section's place in the field of state and local taxation. It was recognized that comparatively little of the Section's energies had been devoted to this subject. Several reasons for this were apparent: Specialists in Federal taxation had little interest in state and local taxation; the problems were frequently so local in character that there was little mutuality of interest in a national body; a national body would have relatively small influence upon local opinion and local legislatures. Despite these difficulties, it was felt that there was a great interest in the subject among present and potential members of the Section. It was decided that a committee should be appointed from those members who have a special interest in the field, and that the committee be given wide discretion in formulating a program and objectives. It is hoped that this committee will develop into a semi-autonomous unit within the Section, and that it ultimately will be an active and highly useful body for an important branch of the law.

It was agreed also that, within the normal framework of the Section, a regular committee be created to consider those problems of state and local taxation which have interstate or comity implications.

Interim Committee Reports

The committee chairmen reported on the subjects which their respective committees were considering, and noted suggestions made by Council members and other committee chairmen.

Mr. Farrier, for the Estate and Gift Tax Committee, reported progress in conversations with government representatives on the complex problems of powers of appointment, and expressed the hope that relief from the present statute would be contained in an early Joint Resolution. Other problems which the committee is considering are the deductibility of expenses attributable to taxable property not administered in the estate, deductions for previously taxed property, and revision of the life valuation tables.

Mr. Kilpatrick, for the Federal Judicial and Administrative Procedure Committee, discussed the effect of the Administrative Procedure Act and of the pending Judiciary Act, the problem of defining issues in the deficiency notice and before the Tax Court, the finality of Tax Court decisions, and the possibility of a rule which would permit the appellate court to review the evidence wherever the trial judge was overruled by the majority of the Tax Court.

Mr. Eichenbaum, for the Excess Profits Tax Committee, discussed the growth formula in §722 cases, and the problems of duplicated claims and interest in §722 cases.

Mr. Ivins, for the Income Tax Committee, discussed the Clifford regulations, trust and estate taxation under §162, constructive receipt in "related taxpayer" cases, the possibility of relief in excessive salary cases, and the problems of family partnerships and corporations.

Every effort will be made to have complete committee reports available for the next Council meeting, which will be held in Washington on June 7 and 8, so that reports can be fully discussed and reviewed before they are placed in the hands of the Section Chairman for printing and distribution before the September meeting of the Association.

A Plea to the Members

Any member of the Association who has a suggestion for Section action is urged to communicate promptly with the chairman of the appropriate committee. The Section is most anxious to cooperate with its membership and your suggestions will be cordially received.

A proposal introduced for the first time from the floor at the annual Section meeting can not have the benefit of the serious study which tax problems normally require. Moreover, such proposals inevitably consume more time than matters which have been studied and reported by a committee and considered by the Council. An effort will be made to postpone consideration of such new proposals to the following meeting. Therefore, please act now.

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Letters to the Editors

An Executor's Law Firm as His Counsel

To the Editors:

I read with great interest the opinion of the Committee on Professional Ethics, No. 271. It is quite true that it is the general practice, where a lawyer is appointed executor, to have his firm represent him. However, it is the law in California that the executor may not share in the attorneys' fees allocated to his firm, which indicates that there may be some limitation on the right of an executor to appoint his firm as counsel.

WALTER S. HILBORN
Los Angeles, California

Length of Judicial Opinions

To the Editors:

In the dissenting opinion *U. S. v. United Mine Workers of America*, in which no Justice except Murphy joined, 23 pages were taken. Likewise the same number of pages for the opinion of the Chief Justice.

Seems to me I once heard or read something about unreasonable length of opinions.

Would it not be well if the Supreme Court itself should set an example?

Footnotes are an abomination

FREDERICK L. PERRY
New Haven, Connecticut

The 104th Article of War

To the Editors:

Reference is made to the comments of Colonel Hornaday (your March issue; page 285). He proves the very truth of one of his assertions. The Colonel is wrong when he writes that the 104th Article of War does not apply to officers in time of peace or that it is limited to "company grade" officers in time of war.

The 104th Article of War applies to all subordinate officers regardless of rank and applies in both peacetime and war-time. The reference, in the 104th Article of War, is that there is a limitation as to the fine in certain cases.

There is a lot of misunderstanding of that Article, both by the Colonel and many other officers; and I agree with him that Congress must provide against the "misuse" of the Article.

CARDINAL WOOLSEY
Chattanooga, Tennessee

Approves the Report as to Improving Military Justice

To the Editors:

I have just read the report of the War Department's Advisory Committee on Military Justice whose membership was nominated by the American Bar Association.

Having had three and one-half years' experience with military justice, I appreciate the soundness of the report and feel that it should have wide dissemination. I am in complete agreement with the findings of fact contained in the report, and I am also in complete agreement with all recommendations except the recommendation that enlisted men be permitted to serve as members of Courts-Martial. I oppose this recommendation solely because I do not think that enlisted men should pass upon the validity of orders given by officers and because the enlisted men chosen for membership on Courts-Martial would no doubt be first sergeants and other non-commissioned officers who had reputation of being stern disciplinarians.

HARPER MACFARLANE
San Antonio, Texas

Suggesting the Association Issue an Index of All Legal Periodicals

To the Editors:

The American Bar Association might very well follow the example of the American Medical Association and publish a complete index of all legal periodicals. The American Medical Association publishes its *Index Medicus* quarterly and, I believe, at the annual rate of $12.00 per year. This index covers all references to the current medical literature.

So far as I know, there is no comparable legal publication at anywhere near the same price. Neither *Current Legal Thought* nor the *Legal Periodical Digest* published by the Commerce Clearing House purport to cover the entire field, but only cover such publications as the editors deem to be of particular significance. It seems to me that there is a need for a publication covering the whole field.

WILLIAM A. CHALLENER, JR.
Pittsburgh, Pa.

The Congress, the Supreme Court and the Exemption of Property from Taxation

To the Editors:

Your review (33 A.B.A.J. 68; January 1947) of a timely article in the *University of Pennsylvania Law Review* by Margaret Spahr, quotes its title: "The Leave-it-to-Congress Trend in Constitutional Law of Tax Immunities". Should this title be stated as "The Trend of the Court to bow to a Congressional interpretation of the Constitution?"

Tax immunity of Governmental activities from State taxation arises from an interpretation of the Constitution. This is true under the "necessary and proper" clause or from a general construction of the Constitution. The Constitution is entirely silent on the question of immunity. Chief Justice John Marshall was the first to write the Court's opinion thus spelling out a total want of power on the part of States to inter-

fere with Government activities. He further pointed out that such immunity did not extend to the shares of stock of the Bank of the United States or its property. *Mc Culloch* v. *Maryland*, 4 Wheat. 316.

Certainly John Marshall did not concede to Congress the right to interpret the Constitution. His opinions supported the Court's duty to interpret and act as a check and balance-wheel of our Government.

Congress, none the less, has repeatedly legislated in the field of tax exemptions. Since 1862 it has declared obligations authorized by it to be tax exempt. This was held to be informative only, in *Plummer* v. *Coler* (1900), 178 U. S. 115, and superfluous in *Macallen Vo* v. *Massachusetts* (1929), 279 U. S. 571.

Congress since 1864 has said that shares of stock in National Banks could be taxed. This was the law as stated by the Court. There was a general confusion in 1860 as to whether "stock" referred to "bonds" or to "shares". What Congress did was to clarify this doubt. Congress said Tennessee could not tax Government property. This was held superfluous. *Van Brocklin* v. *Tennessee*, 117 U. S. 151.

This repeated assertion by Congress as to tax exemptions is carried into many decisions, with the pronounced trend that would lead us to believe that Congress can bind the Court by Congressional interpretations.

In other fields would this apply? If Congress said as a rider to all legislation "in our opinion this Act is constitutional because we so interpret the Constitution", would the Court bow in deference? Is there anything different about tax-exemption legislation that can warrant giving effect to a Congressional blessing or is the Court driving a wedge toward a destruction of our check-and-balance system of Government? It would seem that this is the vital question.

A. D. SUTHERLAND

Fond du Lac. Wisconsin

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The President and the Congress

(Continued from page 420)

tatively offers a solution. Under it the Constitution would provide for concurrent terms of six years for the President, Senators and Representatives, with power in the President (by Executive Order) and in Congress (by concurrent Resolution) to terminate all incumbencies by ordering a new Presidential and Congressional election. One obvious objection to this plan seems to be that under it the issue sought to be submitted to the people would not necessarily be decided. So many sectional, local and personal factors enter into the election of Representatives and even Senators that it is conceivable that the people might return the same Congress and the same President. There is at least this possibility so long as the President and Congress depend not upon one another but upon the people for their election.[12]

Whatever may be the answer, and whether we are yet a sufficiently homogeneous people to agree upon any answer, here is a problem that must eventually be solved. Its solution is one of the major tasks of American statecraft.

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shall then be chosen. The terms of the President and Vice President and of all Senators and Representatives in Congress holding office on the date of such election shall end on the fortieth day following such election and the terms of the persons chosen shall then begin and continue for a period of six years unless earlier terminated by an election held as specified in section 1.

" 'SEC. 3. A new election for the purpose of choosing a President and Vice President, two Senators from each State, and Representatives in Congress shal automatically be held six years after the date of the election last preceding in the event that no call for an earlier election shall have been issued by the President or Congress under section 1.' "

This plan differs from that of Thomas K. Finletter in *Can Rrepresentative Government do the Job?*, 1945, in that Mr. Finletter proposes that only the President be given the right to dissolve Congress and call a general election.

12. The failure of Wilson's appeal for a Democratic Congress and of Franklin D. Roosevelt's "purges" are significant. The reaction of the electorates to the attempt to purge indicated not so much opposition to the President's general policy as resentment at what was felt to be his interference in local affairs. For a challenging comparison of the presidential with the parliamentary system see the chapter titled: "The President and Congress" in *The American Presidency, an Interpretation*, by Harold J. Laski (Harper & Brothers, New York, 1940). For a succinct exposition and analysis of the present methods of communication between the Executive and Congress and of proposed changes see the chapter titled "Legislative-Executive Liaison" in George B. Galloway's *Congress at the Crossroads*, Thomas Y. Crowell Co., New York, 1946. Mr. Galloway was staff director for the LaFollette-Monroney committee.

Cf. *The President, Congress, and Legislation*, by Lawrence H. Chamberlain, Columbia University Press, New York, 1946; *The President, Office and Powers: History and Analysis of Practice and Opinion*, by Edward S. Corwin, New York University Press, Nw York, 1940; *Big Democracy*, by Paul H. Appleby, Alfred A. Knopf, New York, 1945; *A New Constitution Now*, by Henry Hazlitt, 1942; *The Need for Constitutional Reform*, by W. Y. Elliott, 1935; *The Business of Congress*, by Samuel W. McCall, 1911; *A New Constitution for a New America*, by William Macdonald, 1921; *The Republic*, by Charles A. Beard, New York, The Viking Press, 1943; *Congress at the Crossroads*, by George B. Galloway, Thomas Y. Crowell Co., New York, 1946; *The Presidency and the Crisis: Powers of the Office From the Invasion of Poland to Pearl Harbor*, by Louis William Koenig, King's Crown Press, New York, 1944; *U. S. Congress . . . House . . . Committee on the Judiciary . . . Amending the Second War Powers Act, 1942, as Amended . . . Report. (To accompany H.R. 4780.)* 79th Congress 1st Session, House Report 1282, U. S. Government Printing Office, Washington, 1945; *U. S. President's Committee on Administrative Management.* Submitted to the President and to Congress in accordance with Public Law No. 739, 74th Congress 2nd Session, U. S. Government Printing Office, Washington, 1937, Louis Brownlow, Chairman; *University of Chicago Round Table: Congress and the President*, a radio discussion by Everett Dirksen, Walter Johnson and Estes Kefauver, January 20, 1946; *This is Congress*, by Roland Young, 2nd ed., Alfred A. Knopf, New York, 1944; *Strengthening the Congress*, by Robert Heller, National Planning Association, Washington, 1945. See also reviews of the last two of the above books, by Armstrong in *American Bar Association Journal*, April 1945; Vol. 31, page 188.

(Continued from page 433)

This intermediate stage in the slow progress of the world toward effective international cooperation and toward international control of conditions that have to be of world cognizance has produced and retained, at least for the time being, such concepts and devices as the requirements for unanimity of action by the principal Powers in the Security Council (the so-called "veto"), the "optional" jurisdiction of the World Court, the treaty-making method of international legislation, the long insistence of the Senate of the United States that it would not agree in advance to submit any dispute or controversy to the World Court or any arbitration tribunal but will do so only by ratifying a submitted special agreement in the particular case, and now, finally, the Connally Amendment, under which the United States insists that even though it submits to the Court all of its disputes of enumerated types, it will not let the Court decide as to whether a particular dispute is excluded if the United States chooses to regard it as involving matters within its "domestic jurisdiction".

Three Aspects of the Present Issue

1. By some who favored or palliated the Connally Amendment in the Senate last August, it was said that the reservation was only to protect the vital interests of the United States in an emergency, and that the United States of course would not "hide behind" the reservation or invoke it for any light reasons. Assuming this to be so, as your Committee does, we do not think that the jurisdiction and proper functioning of a great Court can be left to the discretion and good faith of a party disputant at a time when its own action is challenged before the Court. If the United States lacks confidence in the Court to such an extent as to feel that it must preserve a right of unilateral determination controlling as to the Court's jurisdiction, certainly the United States leaves itself in poor position to assume the leadership for international law and the submission of legal disputes to the Court.

2. By critics of the Connally Amendment it has been justly pointed out that at no time in its twenty-five years of history has the World Court asserted and maintained its jurisdiction over a dispute in which one of the parties made a substantial showing that the matters involved were "essentially within the domestic jurisdiction" of that state. Here again the *ad hoc* argument based on the Court's record of abnegation, could not be controlling. The vital question is as to what should be the attitude of the United States toward the Court and toward the submission of legal disputes to the Court's determination of its jurisdiction.

3. Reference has been made, by some members of the Senate in debate, to the fact that, under the Statute and the Charter, the World Court has no power to enforce its decisions and mandates; that their enforcement is left to the Security Council, in which the so-called "veto" is available; and that the United States or any other principal Power could therein block and prevent the enforcement of any decision by the Court which invaded matters "essentially within the domestic jurisdiction" of the state affected. Your Committee is of the opinion that the foregoing considerations cannot appropriately enter into the present question. Decisions of the World Court, like those of our own Supreme Court, should be accepted and obeyed and respected because they are made, not because they are enforced. No defeated litigant should exercise, or have, the right to "veto" the decision against it. During the San Francisco Conference and ever since, this Association has vigorously opposed the extension of the "veto power" to the enforcement of decisions of the World Court.

The American Declaration as a Precedent for Others?

Probably the most disturbing aspect of the Senate's insistence of the Connally Amendment last August was the danger that it might be followed by other Nations, in depositing their original Declarations or in superseding Declarations which have become terminable. If this were done extensively, the existing jurisdiction of the World Court under the "optional" clause would be drastically, perhaps fatally, narrowed and curtailed.

Fortunately, no such thing has yet taken place. The Declaration renewed by The Netherlands on August 5, 1946, after the Senate action, contained no such condition (32 A.B.A.J. 896). The Chinese Declaration, deposited on October 26 (two months after the American Declaration), contained no such condition and is a model of concise submission to the Court (32 A.B.A.J. 896). No disposition to follow the precedent of the American reservation has thus far been manifested.[16]

In the opinion of your Committee, this is an added and urgent reason for early action by the Senate to waive and withdraw the Connally Amendment from the American Declaration.

The Conclusions of Your Committee

The foregoing analysis and statement of the matter seem to your Committee to leave no room for doubt as to the stand which our Association should now take or as to the action which it should strongly urge upon the Senate of the United States.

The United States has the greatest stake in the restoration of peace and security, a stabilized economy, and the extension of the rule of law. The United States cannot afford, as your Committee sees it, to retain in its Declaration a condition or limitation of which every other declarant Nation would have full advantage, in denying and destroying the legal position of the United States to require that legal disputes be submitted to the Court. Certainly the

16. In March, however, as shown in Footnote 5 above, the Government of France filed a Declaration which contained the substance of the Connally Amendment.

United States will leave itself in a perilously inconsistent position if it maintains, as it does, that no Nation shall have a "veto power" over enforcement of international and world law against violators of the Atomic Energy Treaty, for example, and yet retains for itself (and an adverse party who has filed a Declaration) the power to prevent a dispute from being heard on its merits by the Court.

The Prospects for Action Against the Amendment

Last October it may have seemed unlikely that action by the Senate to remedy and remove the Connally Amendment could be brought to the stage of serious consideration at any time which could then be forecast. Grounds for a more hopeful view are already apparent; leaders who voted for or acquiesced in the Connally Amendment are less certain of its wisdom.[17]

In any event, your Committee is earnestly of the opinion that the present time is none too soon for our Association to go emphatically on record in favor of the depositing of a new or further Declaration which shall omit and withdraw the condition inserted by the Connally Amendment. Likewise, the present session of the Congress is none too soon for the Senate of the United States to reconsider the subject-matter of the Declaration deposited last August and to take action that will align the United States in full support of international law and the World Court.

Your Committee does not at this time submit recommendations or express an opinion concerning several intricate questions which have been raised as to the effects of the Vandenberg-Dulles Amendments of the Morse Resolution (S. Res. 196) and their embodiment in the Declaration. When the text of the Declaration is reconsidered by the Senate, these provisions may be found to need clarification or excision. Your Committee will continue its study of these aspects of the present Declaration and may make recommendations.

If the House adopts substantially the Resolution accompanying this Report,[18] your Committee will urge upon members of the Senate the reconsideration and withdrawal of the condition or reservation based on the Connally Amendment.

17. Before the New York State Bar Association on January 25, former Senator Warren R. Austin, of Vermont, now the American Delegate to the Security Council, stated that he "regretted" the Connally Amendment. In the Senate on August 3, he voted for the Connally Amendment.

18. The Resolution adopted by vote of the House read as follows, after its recitals (33 A.B.A.J. 249, April issue):

Resolved Further, That the Association, for the fulfillment of the objectives which it has strongly urged for many years in behalf of international law and adjudication, now recommends to the Senate and Government of the United States that they reconsider the subject-matter of the Declaration deposited on August 26, 1946, and that the Senate authorize the filing of a further Declaration which shall not contain the reservation or condition to which the foregoing Resolutions relate.

6 Administrative Procedure Act

(*Continued from page 437*)

formula was taken from the new Supreme Court Rule 52 with respect to the weight to be given to the findings of fact of a trial judge sitting without a jury, and that the phrase "substantial evidence" was intended to be used in the sense then recently defined by the Supreme Court in its decision in the *Consolidated Edison* case on December 5, 1938, where the Court had said:

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . In saying that the record was not "wholly barren of evidence" to sustain the finding . . . we think that the court referred to substantial evidence . . . this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force.[20]

Passage of the Association's Walter-Logan Bill in 1940

The Walter-Logan Bill was passed by the House of Representatives on April 18, 1940,[21] after a miscellaneous list of agencies had been expressly exempted from its provisions by name, and after a debate in which the breadth of its review provisions was criticized. Thus in the debate, Congressman Rankin of Mississippi objected to the "clearly erroneous" formula as follows:

> Mr. Chairman, this is the provision that would authorize the Court to set aside a ruling of one of these boards if the Court determined that the findings of fact were clearly erroneous. In other words, you transfer the physical operations of one of these boards to the Courts. That is one step further in Court government than I believe you want to go.[22]

The phrase, however, was allowed to remain in the bill as passed by the House, but was deleted by the Senate

20. *Consolidated Edison Co. of New York, Inc. v. National Labor Relations Board*, 305 U. S. 197, 59 Sup. Ct. 206, 217; 64 A.B.A. Rep. (1939) 612-613.

The "substantial evidence" formula for determining the scope of judicial review of administrative determinations of fact was recommended in 1939 by the Association's Committee on Administrative Agencies and Tribunals of the Section of Judicial Administration, in proposing a uniform State Administrative Procedure Act. The latter Committee in its report used the following language:

> As to the exact statutory language that should be used to define the review that we have concluded to be desirable, we have found no form of expression which appears more suitable than the one suggested by the Special Committee on Administrative Law in its proposed bill: that the finding of fact should be sustained unless clearly erroneous or unsupported by substantial evidence. Using "substantial evidence" as the Supreme Court of the United States has recently defined it—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"—and adding the term "clearly erroneous" by way of authorizing the Court to go somewhat beyond the mere search for substantial evidence and to correct flagrant error wherever found, we believe that the suggested expression confers all the authority that the Courts can reasonably be expected to accept, while at the same time empowering them to do what is necessary to avert serious miscarriages of justice. . . . With such a statutory authorization as we are here proposing, the Court will have ample power to correct the injustices which are serious enough to impress the judicial conscience with the need for relief, yet the Courts will not be turned into super-administrators or required to step out of their proper judicial role. (64 A.B.A. Rep. (1939). 417-418).

21. 86 Cong. Rec. 4743.

22. 86 Cong. Rec. 4670.

Committee, with the following explanation from Senator King:

> As the bill was originally drafted and as it passed the House recently, it provided that an order might be set aside if the findings of fact were clearly erroneous. This language was criticised on the ground that it would permit Courts to review the evidence and substitute their own independent views of the facts for the findings reached by the bureau. To meet this criticism the Committee on the Judiciary of the Senate has stricken the quoted words from the bill, for those sponsoring this legislation recognize that the administrative agencies are the primary fact-finding bodies.[23]

Grounds of the Veto of the Walter-Logan Bill

Although the bill as finally passed lacked the offending phrase, Attorney General Jackson, in his letter advising a veto by the President, criticized its review provisions as unduly broad, on the ground that they would extend review to "all manner of questions which have never before been considered appropriate for judicial review". He also charged that the bill was too inflexible in providing a uniform review procedure for administrative decisions generally, and that the scope of fact review,—although made only permissive and limited to the familiar "substantial evidence" formula,—was nevertheless so broad as to transfer to the courts much of the discretion proper to be exercised by executive agencies.[24] Translating these objections into popular language, The President in his veto message said:

> The bill that is now before me is one of the repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits and of interests which desire to escape regulation.[25]

Meanwhile, on February 24, 1939, shortly after the original introduction of the Walter-Logan Bill, there had been appointed by Attorney General Murphy, at the suggestion of The President, the so-called Acheson Committee, or Attorney General's Committee on Administrative Procedure, charged with the duty to investigate the need for procedural reform in the field of administrative law.[26] This Committee reported on January 22, 1941, a month after the President's veto of the Walter-Logan Bill. The report was accompanied by two draft bills, one representing the views of the majority, and the other those of the minority, of the Committee.

The majority bill contained no important provisions on the subject of judicial review, but relied on the device of administrative appeal within the agency or department. Its proposals in this respect were but an elaboration of Section 3 of the original Bar Association bill of 1937. They contemplated a separation between the trial procedure and the appellate procedure within the agency.[27] The trial procedure was to be before a hearing commissioner, whose independence from agency influence was supposed to be safeguarded by an elaborate set of statutory provisions, while the administrative appeal was to be heard by the heads of the agency itself. This was a novel reversal of previously discussed plans for having the administrative appeal lie to a tribunal relatively independent of the agency, like the Board of Tax or Patent Appeals.

Minority Recommendations for Judicial Review

The minority of The Attorney General's Committee were of the opinion that the majority recommendations with respect to the independence of hearing commissioners were not sufficiently adequate to dispense with the necessity for more effective judicial review. They suggested that the proposed independence might turn out to be merely formal and colorable, and, while accordingly accepting some of the majority proposals for improvements in procedure within the administrative agency, the minority felt it necessary to go further and provide for more adequate judicial review, including a somewhat fuller and broader judicial review on questions of fact that was in many instances accorded under existing laws. In this connection they pointed out in their report the danger of relying too entirely or confidently on the so-called "substantial evidence formula":[28]

> The present scope of judicial review is also subject to question in view of one of the prevalent interpretations of the "substantial evidence" rule set forth as a measure of judicial review in many important statutes. Under this interpretation, if what is called "substantial evidence" is found anywhere in the record to support conclusions of fact, the Courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate . . . Under this interpretation, the Courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored. The courts, of course, should not weigh meticulously every bit of evidence. Indeed, such a requirement would prove a very undesirable burden. But the courts should set aside decisions *clearly* contrary to the *manifest* weight of the evidence. Otherwise, important litigated issues of fact are in effect conclusively determined in administrative decisions based upon palpable error.

To remedy this defect in the "substantial evidence formula", the minority, in the draft bill which they annexed to their report, provided that the reviewing Court should consider and decide whether the administrative findings, inferences, or conclusions of fact *were unsupported upon the whole record by substantial evidence.* This introduction into the "substantial evidence formula" of the words "upon the whole record", of which no earlier suggestion has been found than the minority report of the Attorney Gen-

23. 86 Cong. Rec. 13676.

24. 86 Cong. Rec. 13943, 13945.

25. 86 Cong. Rec. 13943.

26. See page 1 of the Report of the Committee on Administrative Procedure, printed in Senate Document No. 8, 77th Congress, 1st Sess., entitled *Administrative Procedure in Government Agencies.* This document is hereinafter cited as "REPORT".

27. REPORT, pages 196-201.

28. REPORT, pages 210-211.

29. My friend Mr. Robert M. Benjamin has very kindly called my attention to the fact that an interpretation of the "substantial evidence rule", which in effect amounts to the "substantial on the whole

eral's Committee,[29] may well be thought to represent the most original, helpful and significant contribution yet made to the solution of the difficult problem of judicial review of administrative fact-determinations.

The necessity for such clarification of the substantial evidence formula in spite of the Supreme Court's decision in the *Consolidated Edison* case referred to above[30], was emphasized by Dean Stason at the Senate Committee hearings on the majority and minority bills. Dean Stason's language was as follows:

> Construed grammatically, the term "substantial evidence" might conceivably, although not reasonably, mean little more than a sort of modified scintilla rule . . . . So defined, the requirement simply calls for a searching of the record to find some relevant testimony which can be regarded as substantial to support the order, ignoring all countervailing testimony introduced by the opposing party. There are decisions apparently adopting this modified scintilla method of applying the substantial evidence rule. In fact, in two recent Supreme Court decisions in Labor Board cases, the *National Labor Relations Board* v. *Waterman Steamship Corporation*, 309 U.S. 206, and *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U.S. 318, this scintilla technique seems to have been followed, at least so far as the method is revealed by the written opinion of the Court . . . . . In the *Bradford Dyeing Assn.* case another interesting deviation from good practice appears. The Court seemingly declined altogether to review the inferences drawn from the facts by the Labor Board. Instead the Court regarded the judicial power of review as exhausted in determining whether or not the underlying or evidentiary facts were supported by substantial evidence. This construction of the substantial evidence rule, barring the Courts from reviewing the inferences drawn from the underlying facts, virtually precludes judicial reversal of fact decisions, even though erroneous.[31]

Conclusions as to Origins of Review Provisions of the Act

This serves to explain the inclusion in the minority bill of specific reference to "inference or conclusions of fact", as well as the requirement that "substantial evidence" shall mean evidence that is "substantial upon the whole record".

The word "inference" has not been carried over into the Administrative Procedure Act, but the reference to "conclusions", as well as to "findings", has survived in Section 10 of the Act, as has the requirement that the Court in making its determinations shall review the whole record.

In other respects, the bill submitted by the minority attempted to meet the objections which had been urged against comparable provisions of the Walter-Logan Bill. One of these, as noted above, was that the latter apparently made review available for every kind of administrative decision. This possibly undue breadth of application the minority sought to cure by limiting the review provisions of their bill to so-called "reviewable orders" and by providing a statutory definition of those.[32] This provision was undoubtedly intended to meet Attorney General Jackson's objection that the Walter-Logan Bill swept into "the judicial hopper all manner of questions which have never before been considered appropriate for judicial review".[33]

With this summary of the recommendations of the Acheson Committee minority, the chapter of origins of the judicial review provisions of the Administrative Procedure Act may well be closed. The writer's research may have been incomplete, but he has had no other or subsequent developments brought to his attention, down to the enactment of the Act, which shed additional significant light on any of its review provisions.

II

Scope of the Review Provisions of the New Act

Paragraph 10 (e) of the new Act which is the paragraph prescribing the scope of review, is made applicable to all forms of review which are provided by special statutes no less than to those review procedures, if any, which have their sole source in the Administrative Procedure Act itself. This is because the new Act takes up and incorporates into itself all existing forms of statutory review and establishes these on a new basis in its own provisions. The clear effect of its provisions is to bring existing statutory review procedures under the coverage of the new Act, and thus make applicable to them those provisions of the Act which measure the scope of judicial review. With this preliminary statement as to the general applicability in all Federal review proceedings of the scope of review prescribed by Paragraph (e), the provisions of that paragraph may now be examined.

Paragraph (e) contains two different types of provisions for measuring the scope of review. Provisions of the usual kind, which list the grounds on which the reviewing court may or shall set aside the determinations of the administrative body, are contained in the second sentence of the paragraph. This sentence is couched in mandatory and not permissive language and provides that the Court of review shall set aside agency action, findings and conclusions in six different situations, three of which have to do primarily with questions of law, and the other three with questions of fact. The three situations in which the paragraph requires the reviewing Court to set aside agency action on grounds of law are first, where the action is unconstitutional; secondly, where it is in excess of the statutory jurisdiction of the agency; and thirdly, where it was taken without observ-

record" requirement, was applied by the New York Court of Appeals in the *Stork Restaurant* case (*Matter of Stork Restaurant, Inc.* v. *Boland*, 282 N. Y. 256, 26 N. E. (2d) 247), decided March 5, 1940, where the Court said:

> "The evidence produced by one party must be considered in connection with the evidence produced by other parties. Evidence which unexplained might be conclusive may lose all probative force when supplemented and explained by other testimony. The Board must consider and sift all the evidence."

Thus, according to this form of the substantial evidence test, the reviewing Court must "take into account all the evidence on both sides." See *Administrative Adjudication in the State of New York:* Report to Honorable Herbert H. Lehman, by Robert M. Benjamin, Commissioner, under Section 8 of the Executive Law, 1942, page 329.

30. Page 13.

31. "Administrative Procedure": *Hearings Before a Subcommittee of the Senate Judiciary Committee on S. 674, S. 675 and S. 918, 77th* Cong., 1st Sess. (1941) 1355-1356.

32. REPORT, page 246.

33. REPORT, page 245.

ance of the legally prescribed administrative procedure. The three situations in which administrative action is required to be set aside because of some defect in its factual basis are, first, where it was arbitrary, capricious and constituted an abuse of discretion; second, where it was unsupported by substantial evidence; and, third, when "unwarranted by the facts" in those cases where the facts are subject to trial de novo by the reviewing Court.

Grounds for Reversal Imposed on the Reviewing Court

This specific enumeration of the grounds for reversal imposed upon the reviewing Court constitutes the second sentence of paragraph (e). As the paragraph is drafted, this sentence of enumeration is not to be read alone. It is preceded by a sentence—the first of the paragraph—of more general instructions to the Court, and is followed by a third sentence of like character. Presumably the instructions contained in these general sentences are to be followed by the reviewing Court in the exercise of its duty to reverse administrative action in each of the six enumerated cases contained in the second sentence.

The first sentence of general instruction is as follows:

> So far as necessary to decision and where presented, the reviewing Court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action.

This sentence would seem to apply to those enumerated situations where the Court of review is discharging its duty to reverse for alleged error of law.

The second sentence of general instructions, which appears as the third or last sentence of paragraph (e), is primarily applicable to those situations where the reviewing Court is asked to reverse for error of fact. It reads as follows:

> In making the foregoing determinations the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

The New Statute Changes and Broadens the Review

In the light of this analysis of the three sentences constituting Paragraph (e) which defines the scope of review, it may now be inquired whether the provisions of that paragraph, which are henceforth to be applied in all administrative review proceedings in the Federal Courts, make any change in the rules hitherto applied by those Courts, *first*, with respect to review of questions of law, and, *second*, with respect to review of questions of fact.

I believe that the conclusion which must be reached after such an inquiry is that properly construed the new statute does make a change in both particulars, and broadens in both instances the scope and measure of the review which the Federal Courts are henceforth required to make of administrative action in cases where such action is reviewable at all. Since this conclusion differs from that reached by The Attorney General, who informed Chairman Sumners of the House Judiciary Committee that the Act does no more than declare the existing law concerning judicial review[34], it is necessary to explain briefly the reasons for the view that Paragraph (e) broadens the scope of review of both law and the facts.

The Respects in Which Review Is Broadened

In the first place as to questions of law, Paragraph (e) would seem by its first sentence to impose a clear mandate that all such questions shall be decided by the reviewing Court for itself, and in the exercise of its own independent judgment. More explicit words to impose this mandate could hardly be found than those here employed, which recite that "the reviewing Court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action." The words last quoted seem to have a quite special significance shortly to be pointed out. Does this mandate that the reviewing Court shall reach its own independent conclusions of law and apply them in testing the legality of administrative action go beyond the measure of review hitherto generally applied?

It is true that it has heretofore been generally understood that in a review proceeding questions of law are for the determination of the reviewing Court. A very broad statement of this principle is contained in a classic passage of Mr. Justice Brandeis' concurring opinion in the *St. Joseph Stock Yards* case[35], where he used the following language:

> The inexorable safeguard which the due process clause assures is . . . . . that there will be opportunity for a Court to determine whether the applicable rules of law . . . are observed . . . . The order of an administrative tribunal may be set aside for *any error of law*, substantive or procedural . . . . . There must be the opportunity of presenting in an appropriate proceeding at some time *to some Court every question of law raised*, whatever the nature of the right invoked or the status of him who claims it. (Italics supplied.)

Tendency of the Supreme Court to Omit Judicial Review

This rule, however, has not received in its application the same clean-cut adherence from the Courts which would correspond to its statement by Mr. Justice Brandeis. Increasingly, in recent years the Supreme Court has tended to treat many issues, which, when subjected to adequate analysis, would be seen to be issues of law, as lying within the discretion of an administrative agency, and, therefore, non-reviewable. Beginning with the mandamus cases discussed above, this conception of administrative discretion as including a discretion to decide between doubtful rules of law has gradually permeated into other fields.

The Courts have begun to draw a distinction between two kinds of questions of law: Those which in-

34. 92 Cong. Rec. A3151.

35. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 72, 73, 77; 56 Sup. Ct. 720 (1938).

volve what are sometimes spoken of as general law or legal principles, and others which involve the construction of technical terms and the application of knowledge thought to be expert and specialized. Where the legal question involved in a review proceeding is of the latter character, the Courts have indicated an inclination in many cases not to review it, but to permit the administrative construction of law to stand. In these cases naturally everything turns on where the Court chooses to draw the line between what is "general" and what is "technical," thus in effect leaving to the Court's discretion the determination of whether it would or would not review a legal question.[36]

Perhaps the most outstanding recent instance of this attitude on the part of the Supreme Court is found in the leading tax case of *Dobson* v. *Commissioner*, 320 U. S. 489, decided in 1943, where the statute empowered the reviewing Court to set aside an administration decision not "in accordance with law". In this instance the administrative body, the Tax Court, had reached a conclusion on the ground that a certain transaction resulted in either a capital gain or a return of capital, and not an ordinary gain. There was no controversy as to the facts but merely as to the legal conclusions which should properly be drawn from them on this issue. The Supreme Court, in an opinion which has been the subject of much subsequent comment,[37] took the view that on a question of this kind it would not substitute its own judgment for that of the Tax Court, saying that technical and accounting problems were involved, and that

> . . . when the Court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand . . . In deciding law questions Courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter.[38]

It is submitted that such a position on the part of the Courts will henceforth be hard to square with the specific language of the first sentence of Paragraph (e) of Section 10 of the Administrative Procedure Act, if that sentence is given the effect which an objective reading of its words seems to require. The reviewing Court is there not merely given the power, but by the word "shall" is placed under an obligation, not only to "interpret constitutional and statutory provisions" but to "decide *all relevant* questions of law"[39] (italics supplied); and then follow the additional words which impose on the reviewing Court itself the further duty of determining "the meaning or applicability of the terms of any agency action."

The explicitness of this additional language just quoted, coupled with its reference to "the meaning of the terms" of agency action, would seem henceforth to require the Court in a review proceeding to look for itself at even those technical questions, whether they are regarded as law or fact, which are frequently involved in the "terms of agency action," and which the Courts in recent years have tended to treat as more or less immune from judicial consideration.[40]

Broadened Review is Commanded on Questions of Fact

In the same way that the language of Paragraph (e) seems clearly intended to broaden to the extent just indicated the scope of judicial review on questions of law, there is likewise shown by other language of the paragraph a clear intent to broaden similarly the scope of review on questions of fact. It is submitted that no other conclusion can properly follow the third, or last, sentence of Paragraph (e) when read in the light of the legislative history of the Act and of the earlier bills which preceded it.

The relevant language is that the reviewing Court, in making its determinations in the enumerated situations where it is under a duty to set aside an administrative finding "shall review the whole record or such portions thereof as may be cited by

36. The writer had occasion to discuss this matter somewhat more fully before an Institute on Administrative Law and Procedure conducted by the American Bar Association on September 13, 1940. The address was printed in 25 Minn. Law Review at page 588; the passage relevant in the present connection is at pages 589-592.

37. See, for example, Stern, *Review of Findings of Administrators, Judge and Juries: A Comparative Analysis* (1944) 58 Harv. L. Rev. 70; Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact* (1944) 57 Harv. L. Rev. 753; Plumb: *The Tax Benefit Rule Tomorrow* (1944) 57 Harv. L. Rev. 675.

38. 320 U. S. 489, 502, 64 Sup. Ct. 239, 247.

39. In a relatively recent article in 58 *Harvard Law Review* 70, Robert L. Stern discusses the *Dobson* case and *Gray* v. *Powell*, 314 U. S. 402 (1941), in connection with the review of "mixed" questions of law and fact, and advances a rationale which, if adopted and judicially applied without sympathy for the legislative purpose, might largely eviscerate the guaranties intended and thought to be embodied in the Act. Stern concludes that in reviewing administrative applications or interpretations of broad "technical" statutory terms ("producers" in the *Powell* case and "chargeable to capital account" in the *Dobson* case), judicial designations such as "inference of fact", "ultimate fact", "ultimate conclusion" and "mixed question of law and fact", resorted to for the purpose of holding non-reviewable the matter so designated, are but different modes of expressing the same thought. In his view this thought is that the first, if not the only, question of law presented is whether or not the legislature wanted the judgment or discretion of the agency on the matter in dispute. If this be answered in the affirmative, then it is said to follow that no other question remains for review, even though, as in the *Dobson* case, there was no dispute whatsoever as to the facts. Stern concludes his discussion by commenting that "the duty of the Court is to search for and apply the *legislative* will . . . and not to decide a question for itself whenever it calls for the promulgation of a rule of general application" (page 109).

Assuming the accuracy of Stern's surmise as to the thoughts of the judiciary, the Act should have the effect of discouraging the indicated judicial use of such invocatory phrases as a means of expressing a conclusion that a particular agency function is "by law committed to agency discretion". If the provisions of sub-section 10(e) of the Act are interpreted in the manner undoubtedly intended by their authors, "inferences", "ultimate facts", and "mixed questions" are never any longer exempt from review *per se*, but are instead subject to the enumerated specific requirements of the sub-section. On the other hand, a direct and independent judicial decision of whether the agency function in question was "committed to agency discretion" might be made with relative ease, since the Act does not in terms establish standards for that determination.

The danger is that, in view of these consideration, the Stern rationale or some similar theory may now become the starting point for a reversal of approach, resulting in decisions denying review altogether by finding a legislative delegation of discretion as to the types of functions which, when exercised heretofore, gave rise to judicial application of the type of labels referred to above. Whichever view the reviewing Court may take as to the issue presented, however, it seems clear from the legislative history that the technical nature of the question and the competence of the administrator are not sufficient under the Act to support the extension of "administrative finality" to the point reached by the *Dobson* case and decisions following it.

40. Aside from these clear expressions in the Act itself, significant evidence of a legislative

any party." This language is to be read especially in connection with that part of the previous sentence which lays upon the Court the duty of setting aside "agency action, findings and conclusions . . . unsupported by substantial evidence." These two parts of the statute when read together sum up into substantially the same result as that contained in the bill of the Acheson Committee minority, which required the reviewing Court to consider "findings, inferences or conclusions of fact unsupported, *upon the whole* record, by substantial evidence" (italics supplied).[41]

The intention and meaning of this language was in turn explained by the quotation from Dean Stason's testimony at the Senate hearings, set forth at an earlier point in this paper.[42] It there clearly appears that the purpose and intention of the third sentence of Paragraph (e) of the judicial review section of the Administrative Procedure Act is to eliminate from judicial review of fact determinations not merely the scintilla rule but also that interpretation of the substantive evidence formula which would permit the reviewing Court to examine only one side of the evidence. The purpose of the new provision, while not requiring the reviewing Court to weigh evidence and substitute its own judgment for that of the administrative agency, is to require it at least to look at the evidence on both sides and see whether the evidence in support of the administrative conclusion can fairly be regarded as substantial in the face of the evidence on the other side. This purpose was made explicit in the House Committee Report on the present Bill, where the following language occurs:

> The requirement of review upon "the whole record" means that courts *may not* look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case. (Italics supplied).[43]

Identical language is in the Report of the Senate Committee.[44]

The New Act Goes Further than Existing Formulae as to Review of Facts

Aside from these and similar unmistakable expressions of legislative intent, it seems entirely clear that language which differs as widely as that contained in the last sentence of Paragraph (e) from the hitherto accepted formulae for fact review would not have been used, and that there would have been no reason or excuse for using it in the statute, if it was the intention of Congress by this paragraph to make no change in existing law but merely to restate it. The existing formulae confine themselves to the requirement either that the finding of the administrative agency shall not be "unsupported by evidence" or "shall be supported by substantial evidence".[45]

The Administrative Procedure Act goes further. It does not content itself with a mere restatement of the "substantial evidence" rule; it adds a novel requirement when it says that the reviewing Court in determining whether or not a finding is supported by substantial evidence "shall review the whole record or such portions thereof as may be cited by any party." This new and additional language must be given some meaning. What that meaning is should appear without further comment from the history of the various transformations of the review parts of the earlier bills discussed in the first section of this paper.

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intent that administrative expertise shall not in the future constitute either directly or indirectly a ground for judicial abdication may be found in what Congress *refused* to say. In Section 311(e) of their draft bill the minority of the Acheson Committee enumerated the specific questions of law and fact which might be raised on review, and immediately thereafter added the following proviso:

> "*Provided, however,* That upon such review due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it."

The Acheson minority bill was introduced in the 79th Congress as H.R. 1206, and the House Judiciary Committee heard testimony on it along with the bill which, as amended, became the Administrative Procedure Act. Although the Act adopts most of the judicial review provisions of the minority bill, the injunction of the proviso quoted above seems never to have been seriously considered by Congress or its committees. It was not set forth or mentioned in the Senate Committee print of June, 1945, did not appear in the bills reported by either the Senate or House committees, and no subsequent reference to it or to any similar provision has been discovered in the recorded debates in Congress or in any other document reflecting the legislative history of the Act.

Thus while even the Acheson minority proposal would in principle have restricted the doctrine of the Dobson case by requiring review of "all relevant questions" of law, the requirement could often have been easily satisfied, if not made illusory, by reliance upon administrative specialized skill and competence in matters of law, under the terms of the quoted proviso. It seems inescapable that in writing the Act Congress deliberately decided not to include a provision making possible in that manner a judicial failure to accord what Congressman Lea once referred to as "honest-to-God" review. 83 Cong. Rec. 9096.

41. REPORT, page 246.

42. This testimony, which is set forth in the text at page 515 includes the statement that the *Bradford Dyeing Association* case presented "another interesting deviation from good practice." That "deviation" arose from the view that the judicial power to review facts did not apply to "inferences" drawn by the agency but was limited to a determination of whether the "underlying" facts were supported by substantial evidence. From 1940, when the *Bradford* case was decided, to 1944, when *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U. S. 678, 64 Sup. Ct. 830, was decided, the theory that administrative inferences were not to be tested by the "substantial evidence" rule seems to have finally established in the decisions of the Supreme Court. In the *Medo* case, Chief Justice Stone, writing the opinion of the Court, made the following significant comments in a foot-note:

> "It has now long been settled that findings of the Board, as with those of other administrative agencies, are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised and that upon such questions of law, the experienced judgment of the Board is entitled to great weight . . ." (page 681)

Under the langugage of subsection 10(e) of the Act, there would seem to be no longer any room for a less critical judicial inquiry into the propriety of inferences than into the basis for findings of the "underlying" facts, unless the drawing of the inferences in question is "by law committed to agency discretion." In this important respect also the Act would seem to enlarge the scope of review.

43. Senate Document No. 248, 79 Cong., 2d Sess.; entitled *Administrative Procedure Act, Legislative History*, page 280.

44. *Ibid*, page 214.

45. For examples of how little evidence has been held by reviewing Courts to be sufficient to support administrative decision, see *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U. S. 678, 64 Sup. 830 (1944), particularly Justice Rutledge's dissenting opinion; *Swayne v. Hoyt, Ltd. v. U. S.*, 300 U. S. 297, 57 Sup. Ct. 478 (1937), particularly as to lack of justification for the contract-rate system; *Booth S. S. Co. v. U. S.*, 29 F. Supp. 221 (D.C., S.D. of N.Y., 1939); and the observation of Chief Justice Stone, dissenting in *Bridges v. Wixon*, 326 U. S. 135, 178, 65 Sup. Ct. 1443, 1463, (1945), that "almost each week" the Court accepted administrative findings based on "tenuous support of evidence".

Conclusions as to the Review Provisions of the New Act

In final summary and conclusion, it may be said that if the review provisions of the Administrative Procedure Act are to be construed by the Courts in an objective spirit and in such manner as to give effect to their intent and purpose, they should at least produce two results:

First, they should make impossible a judicial refusal, as in *Dobson* v. *Commissioner,* to consider independently so-called "technical" questions of law; and

Secondly, they should make impossible a judicial failure, as was apparently the case in *National Labor Relations Board* v. *Waterman Steamship Co.*[46] and in *National Labor Relations Board* v. *Bradford Dyeing Ass'n.*[47], to consider whether opposing evidence destroyed the apparently "substantial" character of evidence tending to support the administrative determination of fact.

For apparent examples of judicial failure to examine the whole record, see, in addition to the cases cited above in this footnote; *N.L.R.B.* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 60 Sup. Ct. 918 (1940), particularly as to discharge of employees for participation in union activity; and *N.L.R.B.* v. *Waterman S. S. Corp.,* 309 U. S. 696, 60 Sup. Ct. 611 (1940), where Justice Black, speaking for a Court unanimously reversing the Circuit Court decision holding invalid a Board order, recited certain supporting evidence and then observed that the recitation was "not to say that much of what has been related was uncontradicted and undenied by evidence offered by the Company and by the testimony of its officers". (page 226)

46. 309 U. S. 696; 60 Sup. Ct. 611 (1940).
47. 310 U. S. 318, 60 Sup. Ct. 918 (1940).

Nominating Petitions

For State Delegates

California

To the Board of Elections:

The undersigned hereby nominate Delger Trowbridge, of San Francisco, for the office of State Delegate for and from the State of California to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. Kimpton Ellis, Elbert E. Hensley, Vernon W. Hunt, Edward D. Garratt, Warner I. Praul, Fred Aberle, Leslie L. Heap, Joseph W. Vickers, Emmett H. Wilson and Rex Hardy, of Los Angeles;

Messrs. C. F. Galloway, Herbert L. Hahn, Allyn H. Barber, Frank C. Dunham and Leon W. Delbridge, of Pasadena;

Messrs. Clyde H. Brand, Stephen W. Downey, Archibald M. Mull, Jr., J. W. S. Butler and Clinton E. Harber, of Sacramento;

Messrs. Eustace Cullinan, Percy V. Long, William H. Gorrill, John H. Murray and O. K. Cushing, of San Francisco.

Florida

To the Board of Elections:

The undersigned hereby nominate Robert R. Milam, of Jacksonville, for the office of State Delegate for and from the State of Florida to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. Edward S. Hemphill, Russell L. Frink, Harry T. Gray and Joseph H. Ross, of Jacksonville;

Messrs. William A. Lane, M. L. Mershon, H. N. Boureau, David W. Dyer and Francis G. Rearick, of Miami;

Messrs. J. Thomas Gurney, Donald Walker and W. W. Arnold, of Orlando;

Messrs. Wm. Fisher, Jr., and E. Dixie Beggs, of Pensacola;

Messrs. John D. Harris, Harry L. McGlothlin and Ed W. Harris, of St. Petersburg;

Messrs. Chas. S. Ausley and J. Lewis Hall, of Tallahassee;

Messrs. William A. Gillen, Chester H. Ferguson, G. L. Reeves and T. M. Shackleford, Jr., of Tampa;

Messrs. E. Harris Drew and R. C. Alley of West Palm Beach.

Hawaii

To the Board of Elections:

The undersigned hereby nominate J. Garner Anthony, of Honolulu, for the office of State Delegate for and from the Territory of Hawaii to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. J. Russell Cades, J. Edward Collins, Arthur G. Smith, M. B. Henshaw, Robert B. Griffith, O. P. Soares, C. Nils Tavares, Ronald B. Jamieson, Bernard H. Levinson, John E. Parks, Livingston Jenks, Heaton L. Wrenn, Milton Cades, Jon Wiig, Charles E. Cassidy, U. E. Wild, Ken B. Dawson, C. Dudley Pratt, Hyman M. Greenstein, W. Z. Fairbanks, Samuel Landau, G. D. Crozier, Delbert E. Metzger, Gerald R. Corbett, and Miss Ruth W. Loomis, of Honolulu.

Kansas

To the Board of Elections:

The undersigned hereby nominate Douglas Hudson, of Fort Scott, for

the office of State Delegate for and from the State of Kansas, to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Mr. John H. Lehman, of Abilene;

Messrs. George Templar, Albert Faulconer, O. Renn, Frank G. Theis, Donald Hickman and W. L. Cunningham, of Arkansas City;

Mr. O. P. May, of Atcheson;

Mr. Marc Boss, of Columbus;

Mr. Roy V. Nelson, of Hiawatha;

Mr. Spencer A. Gard, of Iola;

Mr. I. M. Platt, of Junction City;

Mr. John A. Etling, of Kinsley;

Mr. James L. Galle, of McPherson;

Mr. Wm. D. Reilly, of Leavenworth;

Messrs. R. L. Letton, Chas. C. Wheeler, P. E. Nulton, A. B. Keller and Paul L. Wilbert, of Pittsburg;

Messrs. Robt. L. Webb, Barton E. Griffith and E. H. Hatcher, of Topeka;

Messrs. Ralph W. Oman and Claude I. Depew, of Wichita.

Kentucky

To the Board of Elections:

The undersigned hereby nominate T. M. Galphin, Jr., of Louisville, for the office of State Delegate for and from the State of Kentucky to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. Porter M. Gray, W. H. Dysard, J. G. M. Robinson, and Le Wright Browning;

Messrs. Chas. G. Middleton, J. Verser Conner, J. Blakey Helm, Chas. I. Dawson, Squire R. Ogden, Percy N. Booth, John Marshall, Robert F. Vaughan, Arthur Peter, Joseph Selligman, James W. Stites, Davis W. Edwards, Leo T. Wolford, Edw. A. Dodd, and Samuel M. Rosenstein of Louisville;

Messrs. Ridley M. Sandidge, and George S. Wilson, Jr., of Owensboro;

Messrs. James G. Wheeler, A. E. Boyd, T. S. Waller, and W. V. Eaton, of Paducah.

Kentucky

To the Board of Elections:

The undersigned hereby nominate Farland Robbins, of Mayfield, for the office of State Delegate for and from the State of Kentucky to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Mr. Clifford E. Smith, of Frankfort;

Mr. William B. Amberg, of Hickman;

Messrs. Arthur W. Grafton, Robert L. Sloss, Cornelius W. Grafton, Robert W. Brunow, William H. Abell, John E. Tarrant, Wilson W. Wyatt, McCauley L. Smith, Robert E. Grubbs, Lawrence S. Grauman, Thomas J. Knight, Marshall P. Eldred, Eli H. Brown, III, Dorsey W. Brown and Robert E. Webb, of Louisville;

Mr. Henry Jack Wilson, of Mayfield;

Messrs. L. B. Alexander, Earle T. Shoup, A. E. Boyd, Roy M. Shelbourne, T. S. Walter and John D. Driskill, of Paducah;

Mr. C. A. Pepper, of Princeton.

Massachusetts

To the Board of Elections:

The undersigned hereby nominate Frank W. Grinnell, of Boston, for the office of State Delegate for and from the State of Massachusetts to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. Reginald Heber Smith, Virgil C. Brink, Joseph N. Welch, Lucius E. Thayer, Edmund Burke, Arthur J. Santry, W. H. Smart, Cedric W. Porter and Albert West, of Boston;

Messrs. John M. Maguire, Roscoe Pound, Samuel Williston, Lon L. Fuller, W. Barton Leach, Zechariah Chafee, Jr., Erwin N. Griswold, Ernest J. Brown, Warren A. Seavey and E. Merrick Dodd, of Cambridge;

Messrs. John B. Cummings and Harold S. R. Buffinton, of Fall River;

Messrs. Thornton K. Ware and Ralph W. Robbins, of Fitchburg;

Messrs. Horace E. Allen and Julius H. Appleton, of Springfield.

Missouri

To the Board of Elections:

The undersigned hereby nominate Lynn M. Ewing of Nevada, for the office of State Delegate for and from the State of Missouri to be elected in 1947 for a three year term beginning at the adjournment of the 1947 annual meeting:

Messrs. John H. Flanigan, Jr. and George E. Phelps of Carthage;

Messrs. Ray Bond, Vern E. Thompson and Jack Fleischaker of Joplin;

Messrs. Wm. E. Kemp, Robert Edgar Shook, Richard H. Beeson, John H. Lathrop, Cyrus Crane, Sam B. Sebree, David P. Dabbs, Richard S. Righter and Samuel W. Sawyer, of Kansas City;

Mr. Boyd Ewing of Nevada;

Mr. Frank C. Mann of Springfield;

Messrs. Roland F. O'Bryen, Kenneth Teasdale, George C. Willson, Taylor Sandison, W. W. Crowdus, Jesse W. Barrett, Wm. H. Armstrong, Walter R. Mayne and Russell L. Dearmont, of St. Louis.

New Mexico

To the Board of Elections:

The undersigned hereby nominate Ross L. Malone, Jr., of Roswell for the office of State Delegate for and from the State of New Mexico, to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. A. L. Strong, Joseph L. Dailey, John F. Simms, Thomas E. Ahern, Jr., Robert Botts, Frank O. Westerfield, Joseph L. Smith, Merritt W. Oldaker, A. T. Hannett, and Edwin L. Swope, of Albuquerque;

Messrs. Don G. McCormick, James W. Stagner and Charles M. Tansey, Jr., of Carlsbad;

Messrs. Charles R. Brice, J. D. Atwood and George L. Reese, Sr., of Roswell;

Messrs. Robert W. Ward, C. C. McCulloh, Harry L. Bigbee, Norman M. Neel, B. P. Wood, Daniel T. Sadler and Eugene D. Lujan, of Santa Fe;

Messrs. Floyd W. Beutler and R. Howard Brandenburg, of Taos.

North Carolina

To the Board of Elections:

The undersigned hereby nominate Luther T. Hartsell, Jr., of Concord, for the office of State Delegate for and from the State of North Carolina to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. J. Laurence Jones, John A. McRae, Hunter M. Jones, Brock Barkley, E. McA. Currie, Thaddeus A. Adams, Paul R. Ervin, Edward J. Hanson, G. T. Carswell, Frank K. Sim, Jr., B. Irvin Boyle, John D. Shaw, Jas. A. Bell, Neal Y. Pharr, Charles W. Bundy, C. A. Cockran, P. C. Whitlock, John James, Arthur Goodman, James B. McMillan, Nathaniel G. Sims, John S. Cansler, James O. Moore, Warren C. Stack, and W. S. O'B. Robinson, Jr., of Charlotte.

North Carolina

To the Board of Elections:

The undersigned hereby nominate C. Richard Wharton, of Greensboro, for the office of State Delegate for and from the State of North Carolina, to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. H. B. Campbell, C. W. Tillett, Jr., Warley L. Parrott, Carrie L. McLean, Wm. J. Mulliss, C. H. Gover and H. C. Dockery, of Charlotte;

Mr. George B. Mason, of Gastonia;

Messrs. Welch Oliver Jordan, D. E. Hudgins and Andrew Joyner, Jr., of Greensboro;

Messrs. John H. Anderson, Jr., Oscar Leach, James K. Dorsette, Jr., H. E. Powers, W. T. Joyner, Wm. C. Lassiter, I. M. Bailey, Clem B. Holding and J. C. B. Ehringhaus, of Raleigh;

Messrs. Francis E. Winslow, Kemp D. Battle, Herman S. Merrell, Samuel L. Arrington and I. D. Thorp, of Rocky Mount.

North Dakota

To the Board of Elections:

The undersigned hereby nominate Herbert G. Nilles, of Fargo, for the office of State Delegate for and from the State of North Dakota, to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. John A. Zuger, William Murray, Gordon V. Cox and W. L. Nuessle, of Bismarck;

Messrs. H. A. Mackoff, Theodore Kellogg, L. R. Baird and J. W. Sturgeon, of Dickinson;

Messrs. L. H. Oehlert, George A. Soule, John J. Nilles, Neal E. Williams, and A. O. McLellan, of Fargo;

Messrs. C. J. Murphy, T. A. Toner, Philip R. Bangs, C. F. Peterson, H. A. Bronson and O. B. Burtness, of Grand Forks;

Messrs. Robert H. Bosard, G. S. Wooledge, O. B. Herigstad and Geo. A. McGee, of Minot;

Messrs. Roy A. Ployhar and L. T. Sproul, of Valley City.

Pennsylvania

To the Board of Elections:

The undersigned hereby nominate J. Harry LaBrum, of Philadelphia, for the office of State Delegate for and from the State of Pennsylvania to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. James B. Doak, William White, Jr., Edward S. Morris, Claude C. Smith, Clarence G. Myers, Rutledge Slattery, John B. Martin, J. S. Conwell, Ernest Scott, John D. M. Hamilton, James A. Montgomery, Jr., Thomas E. Comber, Jr., Frederick H. Spotts, Mark E. Lefever, Joseph Neff Ewing, W. B. Saul, Chas. A. Wolfe, George G. Chandler, Alexander Conn, Morris Wolf, Samuel L. Gerstley, Morris H. Goldman, Walter B. Gibbons, William J. Conlen and George E. Beechwood, of Philadelphia.

Pennsylvania

To the Board of Elections:

The undersigned hereby nominate David F. Maxwell, of Philadelphia, for the office of State Delegate for and from the State of Pennsylvania, to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. Walter H. Compton, Ralph E. Evans and John McI. Smith, of Harrisburg;

Messrs. Desmond J. McTighe and Walton Coates, of Norristown;

Messrs. Leon J. Obermayer, G. Ruhland Rebmann, Jr., J. Warren Brock, John F. E. Hippel, George B. Clothier, Joseph W. Henderson, Thomas F. Mount, Robert Dechert, Charles Myers and Cuthbert H. Latta, Jr., of Philadelphia;

Messrs. John G. Buchanan, William Watson Smith, William J. Kyle, Jr., Frank B. Ingersoll, A. P. Weitzel, Allen T. C. Gordon, Elmer E. Myers, George M. Heinitsh, Jr., Edward H. Schoyer and Edgar D. Bell, of Pittsburgh.

Tennessee

To the Board of Elections:

The undersigned hereby nominate Albert Ewing, Jr., of Nashville, for the office of State Delegate for and from the State of Tennessee to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. H. T. Poore, Taylor H. Cox, and R. Arnold Kramer of Knoxville;

Messrs. Edward Wm. Kuhn, H. Dent Minor, W. P. Armstrong, Wm. Percy McDonald, Hunter Lane, John T. Shea, J. Seddon Allan, Charles M. Crump, A. O. Holmes, Sam Costen and E. W. Hale, Jr., of Memphis;

Messrs. C. W. Tuley, Paul A. Green, Chas. L. Cornelius, George H. Armistead, Jr., John M. Barksdale, Seth M. Walker, John J.

Hooker, F. A. Berry, Lindsey M. Davis, W. P. Cooper and Lee Douglas, of Nashville.

Vermont

To the Board of Elections:

The undersigned hereby nominate Osmer C. Fitts, of Brattleboro, for the office of State Delegate for and from the State of Vermont to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. Gelsie J. Monti, T. Tracy Lawson and H. William Scott, of Barre;

Mr. Francis A. Bolles, of Bellows Falls;

Messrs. Douglas L. Tupper, Harrie B. Chase and John A. Lowery of Brattleboro;

Messrs. A. Pearley Feen, Sherman R. Moulton, Philip W. Hunt, Clarke A. Gravel, Chas. F. Black and Louis Lisman, of Burlington;

Messrs. Walter G. Nelson, Jr., George W. Hunt, Deane C. Davis, George L. Hunt, Raymond B. Daniels and Miss Grace J. Murphy, of Montpelier;

Mr. John C. Sherburne, of Randolph;

Mr. John D. Carbine, Robinson E. Keyes, George F. Jones and James S. Abatiell, of Rutland;

Mr. Jutten A. Longmoore, of St. Johnsbury.

Virginia

To the Board of Elections:

The undersigned hereby nominate Thomas B. Gay, of Richmond, for the office of State Delegate for and from the State of Virginia, to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. Gardner L. Boothe and Armistead L. Boothe, of Alexandria;

Messrs. Joseph W. Richmond and Lyttelton Waddell, of Charlottesville;

Messrs. A. M. Aiken and Frank Talbott, Jr., of Danville;

Messrs. S. H. Williams, Douglas A. Robertson and F. G. Davidson, Jr., of Lynchburg;

Messrs. Robert B. Tunstall, Leigh D. Williams, Jos. L. Kelly, Jr., W. R. C. Cocke and L. S. Parsons, of Norfolk;

Messrs. E. Randolph Williams, J. R. Tucker, John H. Bocock, A. S. Buford, Jr., and S. G. Christian, of Richmond;

Messrs. Frank W. Rogers, John L. Walker, Jas. P. Woods, Andrew S. Coxe and Fred B. Gentry, of Roanoke;

Mr. Stuart B. Campbell, of Wytheville.

Wisconsin

To the Board of Elections:

The undersigned hereby nominate John S. Sprowls, of Superior, for the office of State Delegate for and from the State of Wisconsin to be elected in 1947 for a three-year term beginning at the adjournment of the 1947 annual meeting:

Messrs. Otto A. Oestreich and Malcolm P. Mouat, of Janesville;

Messrs. Warren H. Resh, Gilson G. Glasier, Arthur A. McLeod, W. Wade Boardman and M. B. Rosenberry, of Madison;

Messrs. Carl B. Rix, Albert B. Houghton, Ronold A. Drechsler, Frank T. Boesel, Vernon A. Swanson, Theodore C. Bolliger, J. G. Hardgrove, James I. Poole, Paul M. Barnes, C. Steinmetz, Jr., T. Fred Baker, Herman E. Friedrich and John S. Best, of Milwaukee;

Mr. R. T. Reinholdt, of Stevens Point;

Messrs. Lyman T. Powell, Jr., R. E. Anderson, Donald A. Rock and Fred S. Parker, of Superior.

Wyoming

To the Board of Elections:

The undersigned hereby nominate Charles E. Lane, of Cheyenne, for the office of State Delegate for and from the State of Wyoming to be elected in 1947 for a one-year term beginning with the adjournment of the 1947 annual meeting:

Mr. S. S. C. Chilcote, of Basin;

Messrs. Burt Griggs, Alvin T. Clark and Robert B. Rose, of Buffalo;

Messrs. H. B. Durham, Fred W. Layman and Mrs. Madge Enterline, of Casper;

Mr. Ernest J. Goppert, of Cody;

Mr. Clarence W. Cook, of Evanston;

Mr. Elwood Anderson, of Gillette;

Mr. R. S. Gardner, of Glenrock;

Mr. Lee S. Nebeker, of Green River;

Mr. Jos. O. Spangler, of Greybull;

Mr. L. A. Bowman, of Lovell;

Messrs. Wm. S. Edmonds, Ivan S. Jones and Patrick J. Quealy, of Kemmerer;

Mr. Vernon G. Bentley, of Laramie;

Mr. Thomas O. Miller, of Lusk;

Mr. Preston T. McAvoy, of New Castle;

Mr. Theodore P. Gahan, of Rawlins;

Mr. Willett M. Haight, of Riverton;

Mr. Charles A. Kutcher, of Sheridan;

Messrs. T. Blake Kennedy and George E. Brimmer, of Cheyenne.

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LIEUTENANT-COLONEL WITH MILITARY Government of Germany returning home about August desires legal position with business or law firm. Age 40. A.B. LL.B. Kansas bar. Former member of state legislature. Former Chief of Claims for Seventh Army. President of Military Government General Court, one of highest courts in Germany, since April 1946. Box BM.

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LABOR ATTORNEY, FORMERLY ASSISTant to Wage Hour Administrator and to Industry Member of WLB Fact Finding Commission; twelve years' experience in Government Agencies regulating labor and Industry; extensive experience in negotiating with unions. Box WC.

ENGINEER-LAWYER, 38, VETERAN, EXperienced in engineering and statistical analysis. Law and Civil Engineering graduate, admitted to the Maryland and District of Columbia bar. Interested in a law firm or legal department of an industry. Box LS.

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EXPERIENCED ATTORNEY, PRINCETON and Harvard Law School graduate, war veteran, would like to return to professional work. Present position in Law Department of large corporation. Member bars of 2 states and U. S. Supreme Court. Government lawyer 1 year, law firm associate 2 years, private practice 10 years. Episcopal vestryman, excellent references. Firm association or partnership relation with established practitioner desired. Box DR.

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An interesting comment quoted from "DISTRICT AND COUNTY REPORTS", published by The Legal Intelligencer, Philadelphia, Pennsylvania, relating to Volume 48 Corpus Juris Secundum:

> "Much the most interesting title in this volume is the opening one: 'International Law'. The very names of the cases and texts—particularly the latter—cited in the footnotes have a romantic flavor found nowhere else in a legal encyclopedia. The title here appears to cover international law only in its commonly accepted and narrower sense, not including conflict of laws.
>
> 'Intoxicating Liquors' is the lengthiest title in the volume. ***As a quick test of the thoroughness of the editorial work, we located in a matter of seconds, through the descriptive-word index,*** the section devoted to the well-known, annoying and insoluble controversy as to the application of the Pennsylvania Liquor License Quota Law to social clubs.
>
> The editors list 21 court decisions holding the statute to be applicable and 25 (up to and including Volume 54 of our Pennsylvania District & County Reports) holding it inapplicable. Anyone wishing reliable information on whether or not this is a complete score will have to consult another department, ***but an encyclopedia that furnishes that number of citations upon a problem of purely local interest ought to satisfy the most critical***".
>
> ***(Italics ours)***